UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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JOHNSON & JOHNSON,

Plaintiff,

v. 06 CV 7685 (RJS)

GUIDANT CORPORATION,

Defendant.

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New York, N.Y.
December 15, 2014
9:43 a.m.

Before:

HON. RICHARD J. SULLIVAN,

District Judge

APPEARANCES

KRAMER LEVIN NAFTALIS & FRANKEL LLP
Attorneys for Plaintiff
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BY: DAVID BOIES, ESQ.
WILLIAM S. OHLEMEYER, ESQ.
IAN M. DUMAIN, ESQ.
JACK A. WILSON, ESQ.
AND
SHEARMAN & STERLING, LLP
BY: JOHN GUELI, ESQ.

(In open court; trial resumed)

THE COURT: Okay. Have a seat. Sorry to keep you waiting. I had a preliminary injunction that came in this morning, and we had to just figure out what it was about and then issue a short order. So I hate to keep this many folks waiting around. What a popular case. It must be for you, Mr. Boies. It wasn't this crowded the last time we were here.

MR. BOIES: I'm glad to be back, your Honor.

THE COURT: Good. So as I understand it, we're going to start with Mr. Mulaney.

MR. BOIES: Yes, your Honor.

THE COURT: And then we're going to go with?

MR. BOIES: Mr. Kury.

THE COURT: And that should take us through the day?

MR. BOIES: Yes, your Honor.

THE COURT: Any preliminaries before we jump in with witnesses?

MR. COFFEY: Your Honor, we had submitted a letter regarding Mr. Stoll, and part of it was subject to the Court's order because there is a Stoll affidavit in the record. We want to make sure that our inability to cross-examine him --

THE COURT: Okay. We can take that up now. It seems that the parties are deemed to determine that he is -- well, that they're prepared to agree that he's deemed unavailable for purposes of 32A4(C) and Federal Rule of Evidence 804A4. But nobody told me what the situation is.

MR. WEINBERGER: Well, I think we'll let them tell you what the situation is.

THE COURT: You're disagreeing amongst yourselves that he's sick, but he's really not sick?

MR. OHLEMEYER: No.

THE COURT: Is this something we'd rather not do on open record?

MR. OHLEMEYER: Yes, I think so.

THE COURT: Okay.

MR. COFFEY: Suffice it to say that certain representations were made to us by Skadden Arps through the lawyer who, I believe, is their general counsel about Mr. Stoll, and we consulted with Guidant and came to the conclusion we did. We are certainly happy to elaborate more.

THE COURT: I think I have to make my own independent findings; so I probably need a few facts. We can do this at the sidebar, or we can do this with a letter that perhaps is a request that it be sealed because there's the presumption of the records being overcome by privacy issues or health.

MR. COFFEY: I think that one way we can deal with this, I understand Guidant is prepared to withdraw that submission. That's something they can do. We just want to make sure that that's done.

THE COURT: The submission, meaning the affidavit?

MR. COFFEY: The affidavit of October --

THE COURT: Right, but then the plan was to rely on some other things, right?

MR. COFFEY: Well, then we would be planning deposition, which we could do because your Honor makes a finding that he's unavailable or if they don't lodge a hearsay objection.

THE COURT: Right, but I guess I'm not going to do that until I've concluded that he's unavailable.

MR. COFFEY: Very well, your Honor.

THE COURT: I think that's what I would be inclined to do. So I guess I'd just like a little more information. I'm not looking to throw a monkey wrench in this, but I think I have to make my own finding. Right?

MR. OHLEMEYER: Your Honor, there's a Skadden representative here, who's communicated with both of us. He's back in the jury room. We could do that at your leisure, but I do think, given the issues involved, it makes sense to do it at sidebar.

THE COURT: Okay. Do you want to do this first, or do you want to do this later?

MR. OHLEMEYER: I don't think -- I don't think it needs to be done now.

MR. COFFEY: We agree with that, your Honor.

THE COURT: It doesn't have to be done now?

MR. COFFEY: I don't think so.

THE COURT: It means that somebody is going to be sitting around all day waiting for us?

MR. OHLEMEYER: No, no. He's here anyway.

THE COURT: Okay. All right. Well, let's jump in with the witness. If we can put this off until lunch, let's do that. Okay. So we're going to bring in Mr. Mulaney.

So both the Jets and the Giants won, Mr. Coffey.

MR. COFFEY: I actually was focused on the Army-Navy.

THE COURT: I was up at West Point last week with Mr. Deluzio.

MR. COFFEY: The one thing we have in common is everyone at West Point Annapolis all applied for Annapolis.

THE COURT: That's not what they were saying. The cadets did seem somewhat fatalistic about the game, and why wouldn't they be? 13 in a row, my goodness. Did you guys win in your four years?

MR. COFFEY: We won the first three, and then shockingly lost my senior year, which continues to be a lifelong disappointment.

THE COURT: Mr. Deluzio, your team you won once?

THE DEPUTY CLERK: Never lost.

CHARLES MULANEY,

called as a witness by the Defendant,

having been duly sworn, testified as follows:

THE COURT: If you could, once you're comfortable, just state your name and spell your name for the record.

THE WITNESS: Charles Mulaney, Jr., M-u-l-a-n-e-y.

THE COURT: Okay. Mr. Mulaney, I'm going to give you a bit of water. If you need more, just let me know.

THE WITNESS: Thank you, your Honor.

THE COURT: Sure. Okay. Let's proceed, Mr. Boies.

DIRECT EXAMINATION

MR. BOIES: Thank you, your Honor.

BY MR. BOIES:

Q. Mr. Mulaney, let me hand you what's been marked as Defendant's Exhibit 167, together with a copy of all of the exhibits that are mentioned in that Defendant's Exhibit 167. Do you have that?

A. I do.

Q. Do you recognize Defendant's Exhibit 167?

A. Yes, I do.

Q. Could you identify it for the Court?

A. It's the trial testimony affidavit that I prepared in anticipation of this trial.

Q. Have you had an opportunity to review that testimony recently?

A. Yes, I have.

Q. Do you have any changes to that testimony that you feel you want or need to make?

A. No, I do not.

MR. BOIES: Your Honor, I would offer Defendant's Exhibit 167. With that, pass the witness.

THE COURT: Okay. Thank you very much, Mr. Boies. The cross will be by Mr. Coffey.

CROSS-EXAMINATION

BY MR. COFFEY:

Q. Good morning, Mr. Mulaney.

A. Good morning.

Q. My name is Shawn Coffey. I'm with Kramer Levin. We haven't met before, have we?

A. I don't believe so.

Q. We'll hand out some binders that contain some of the exhibits we may be going through today. I'm going to grab this, just so you don't have as much here. If you need it, it will be right here.

Now, Mr. Mulaney, in your trial affidavit you make reference to the December 5 proposal made by Boston Scientific to Guidant. I'd like to begin with that. If you could, please, turn to the tab that's Kury Exhibit 10, and I want to talk about and ask you some questions about the letter that's attached to the e-mail that's the cover e-mail.

Do you recognize that to be the letter that Boston Scientific sent to Guidant on December 5, 2005, making its tentative proposal to acquire Guidant?

A. Yes, I do.
Q. All right. Sir, I'd like to direct your attention to Page 2, which lists a number of conditions to the proposal. Begin at the top of Page 2. You would agree that Boston Scientific has informed Guidant that its proposal is subject to its due diligence of the company, right?
A. Yes, that's what the letter says.
Q. And in the next paragraph it says that the proposal is also subject to the final approval of the Boston Scientific board, right?
A. Any definitive transaction is subject to the approval of the Boston Scientific board, yes.
Q. Right. And any definitive transaction would also be subject to the approval of the Boston Scientific shareholders; is that correct?
A. That is correct.
Q. At the end of that second paragraph, there is a reference to financing; do you see that, that last sentence?
A. Yes, I do.
Q. Boston Scientific is telling Guidant that its proposal is not subject to any financing condition; do you see that?
A. Yes, I do.
Q. The next paragraph refers to what I would call generally antitrust risk; do you see that paragraph?
A. Yes, I do.

Q. And in this paragraph, Boston Scientific says that it's prepared to divest Guidant's VI and ES businesses while retaining shared rights in Guidant's DES program; do you see that?
A. Yes, I do.
Q. Now, nowhere in this paragraph or in this letter, in fact, does Boston Scientific say that its proposal is subject to lining up a divestiture buyer before making a definitive proposal to acquire Guidant; isn't that correct?
A. I don't believe such a statement is in the letter.
Q. Right. And so that is consistent with the scenario where Boston eventually makes a firm offer, the Guidant board determines it's superior, the J&J merger agreement is terminated, a definitive agreement is signed between Guidant and Boston, and then Boston seeks its divestiture solution, right?
A. No. It's consistent with it. It's totally consistent with various other scenarios, as well, including that before we proceed with a definitive offer, before Guidant receives a definitive offer from Boston Scientific, a divestiture candidate is already lined up.
Q. Right, but it is consistent with a number of things, you say, but one of them is the scenario that I just described, right?
A. It does not preclude that scenario, correct.

Q. Right. You're familiar with something called the "hell or high water" provision?
A. Yes, I am.
Q. Right. So this is consistent. One of the ways this could be interpreted is Boston is willing to do a "hell or high water" provision?
A. I don't know why one would interpret it that way because it isn't that specific.
Q. Right. Well, what it doesn't say is we need to line up a, "sign on the dotted line" divestiture party before we make a firm offer for Guidant; it does not say that, right?
A. It does not contain those words, no.
Q. So one of the scenarios that you acknowledge this could suggest is where Boston Scientific would assume the risk in signing a definitive agreement with Guidant, right? That's one scenario?
A. I repeat, I don't think this letter suggests any particular scenario. It just says what it says.
Q. But it doesn't exclude that scenario, right?
A. It does not exclude it.
Q. In fact, that scenario is how Johnson & Johnson made its deal with Guidant; isn't it, sir?
A. Yes, under different circumstances.
Q. Johnson & Johnson did not reserve for itself the right to line up a divestiture partner before it signed its definitive

agreement with Guidant in December of 2004; isn't that right?
A. That's correct, because Boston -- because Guidant, at that time, was not known to be for sale, not known to be talking to Johnson & Johnson; and Johnson & Johnson, lining up a divestiture sale at that time, might have publicly disclosed that Guidant and Johnson & Johnson were talking. And Guidant was not necessarily interested in --
Q. I really asked you why --
THE COURT: I'm sorry, Guidant was not necessarily interested in what?
THE WITNESS: In there being public disclosure that it was in discussions with Johnson & Johnson.
THE COURT: I assume Johnson & Johnson may have had the same interest, right?
THE WITNESS: Yes, that's why I believe that the circumstances in the Johnson & Johnson/Guidant courtship, if you will, are quite different than when Boston Scientific approaches Guidant with a signed deal between Guidant and Johnson & Johnson.
THE COURT: All right. But there's nothing in this letter that says anything about a divestiture party being a prerequisite to a formal offer, having it lined up?
THE WITNESS: That's correct, your Honor, it doesn't say.
THE COURT: Okay. Next.

BY MR. COFFEY:
Q. And regardless of why the initial Johnson & Johnson/Guidant agreement was created the way it was, isn't it true that Johnson & Johnson did not reserve for itself at that time the right to line up a divestiture party before making the definitive offer for Guidant?
A. Well, they didn't line up a divestiture partner.
Q. All right. Now, in your trial affidavit you say several times that Guidant had expressly bargained for the right to take a better offer, if it came along and met the criteria. You remember that you said that several times?
A. Yes.
Q. And you also mentioned that what Johnson & Johnson bargained for was a last look, an opportunity to respond to whatever was deemed a superior proposal by a rival bidder, correct?
A. Correct, among other things.
Q. Now, with regard to what Guidant expressly negotiated for, that right came with limits, right?
A. It came subject to terms of the merger agreement, yes.
Q. Right. Let's take a look at that agreement. Can we call up Kury Exhibit 9. If you could turn to Kury Exhibit 9 in your book, please. We will go to Page 6226, section 4.02.
And, Mr. Mulaney, we'll be calling up things on the screen, too. You can look at that, which, hopefully, will help

pinpoint where I'm going with my question, but you're also free to look at the document itself.

Now, I'm going to ask you some questions about how 4.02 operates, and to do that, I'm going to ask you to look at this term on two different days. On the first day that we're going to go through is December 4, 2005. There's no proposal on the board. All right?

And so I want to direct your attention to 4.02(A)(ii) and (ii), and see if you agree with me that as of that date, neither Guidant or its representatives could solicit a takeover proposal, right?

A. That is correct.

Q. And what does that mean?

A. Neither Guidant nor its representatives could be active in suggesting, inducing, encouraging a third party to make a takeover proposal.

Q. It also says that the company and its representatives can't initiate a takeover proposal. Is that related to perhaps an LBO or management takeover; is that what that's initiating, a takeover proposal?

A. I think it's referring to initiating something having to do with a takeover proposal, which comes from a third person; so I don't think it's a self-generated transaction.

Q. All right. Guidant and its representatives were also prohibited from knowingly encouraging a takeover proposal,

right?
A. Correct.
Q. And what does that mean?
A. Knowingly inducing, stimulating, suggesting that the third party make a takeover proposal.
Q. And it actually is a little broader than that, right? They're not allowed to take any action that, quote, could reasonably be expected to do so, right?
A. Could reasonably be expected to facilitate any takeover proposal.
Q. Or encourage, right? Or solicit?
A. Well, the "reasonably expected to" language modifies "facilitate," not "encourage."
Q. So your testimony is this clause would prohibit the company and its representatives from taking any action, which could reasonably be expected to facilitate the takeover proposal?
A. That's what the clause says, yes.
Q. Now, under (ii) it says, "enter into, continue or otherwise participate in any discussions or negotiations regarding or furnished any person any information," and this is the language I want to focus on, "or otherwise cooperate in any way with any takeover proposal."

My question, sir, is: What did you understand the phrase "or otherwise cooperate" -- excuse me. What did you understand the phrase, "or otherwise cooperate in any way with"

to prohibit on behalf of Guidant and its representatives?
A. Well, consistent with the prior section of (ii), Guidant and its representatives were not to continue or enter into or participate in discussions or negotiations or give information, and the general catchall is, or do other things with respect to the discussions, negotiations or action that could be deemed cooperating with a takeover proposal.
Q. And they can't do anything besides those things that 4.02 carves out, right?
A. You they can't do what 4.02 prohibits.
Q. Right. So let's turn to -- well, withdrawn.
So this provision is not unusual, in your experience, is it, 4.02, the prohibitions of 4.02?
A. No, it is not an unusual provision.
Q. Now, so while Guidant bargained for the right to entertain a potential superior bid, J&J had bargained for the, for Guidant to agree not to do these prohibited things, right?
A. Correct.
Q. And that's more than just a last look, isn't it, Mr. Mulaney?
A. It is more than a last look, but the last look obtains when we're now discussing actions that are regulated by a different section of the agreement.
Q. Right. The rules change, right, when there's a takeover proposal that the board determines to be superior?

A. Right, the rules change.
Q. Sorry. Right. And it changes and now it allows Guidant to do two specific things, right?
A. It allows Guidant to do what is not prohibited.
Q. Well, 4.02, let's turn to -- let's turn to what Guidant can do, and do I understand you to say that -- well, we'll go at it this way.
Let's now turn to three days later, December 7th, and the Guidant board has before it the Boston Scientific's December 5 proposal and is evaluating whether it's likely to lead to a superior proposal.
Now, you were at that Guidant board meeting, right?
A. Yes, I was.
Q. And why don't we call up Kury Exhibit 65. If you could turn to that in your book, please. And if you'll see here, this is an e-mail that's distributing some materials for that board meeting, and what I'd like to do is direct your attention to a Skadden memorandum that's inside this, at the page that ends in Bates No.s 2680. Do you recognize that Skadden document?
A. Yes, I do.
Q. And this is a document that you reviewed before it went to the board?
A. Yes, it is.
Q. Now, I want to direct your attention to the first question

and the first part of the answer. And what Skadden has summarized for the board here is the no shot, no facilitation part of the section 4.02 that we just reviewed, right?
A. Yes.
Q. Now, we just discussed that if Guidant's board makes the determination that Boston Scientific's proposal is likely to lead to a superior proposal. I said Guidant gets permission to do two things, and you answered, it gets to do that which is not prohibited. Are those two different things?
A. Well, they may or may not be, depending on the particular question, I suppose.
Q. Well, my question is that -- well, let's start with the facts. The Guidant board did make that determination, right, that the Boston Scientific December 5 proposal was likely to lead us to a superior proposal, correct?
A. Correct.
Q. And in that instance, Guidant was then allowed to furnish information to Boston Scientific and its representatives, and to enter into negotiations with Boston Scientific; those two things, and those two things alone, isn't that right?
A. Enter into discussions and negotiations with Boston Scientific, yes.
Q. With that caveat, those two things, right?
A. It can do those two things.
Q. Right. It can't do anything else, right?

A. It can do other things that are not otherwise prohibited.
Q. What are some things -- you're saying that the two things that it permitted you under 4.02 are among the things it can do, but it's not limiting as to what Guidant can do?
A. What I'm saying is, under the structure of the merger agreement, Guidant can do what is not prohibited.
Q. Well, let's see what we can agree on. If we do go down to the next part of the answer and what Skadden has told the board is that if it determines that the proposal is -- constitutes or is reasonably likely to lead to a superior proposal, Guidant may, and then there are two bullets. Would you agree with me that there are two bullets in the Skadden memo to the board?
A. Yes, there are.
Q. And one of them is about providing information to Boston Scientific, right?
A. Yes.
Q. And the other is that it can participate in discussions or negotiations with Boston Scientific, right?
A. Yes.
Q. There is nothing else it can do, right, under 4.02 except these two things?
A. No, there are other things it can do. It can furnish information to Boston Scientific's representatives, and it can enter into discussions and negotiations with Boston Scientific's representatives.

Q. Okay. Other than those two things you've just clarified, thank you, can it do anything else?
A. Well, it can do whatever is not prohibited.
Q. Can you identify for the Court, please, something that isn't on the Skadden memo that you are telling us that Guidant could do?
A. Well, it wasn't addressing that question with the board of directors at the time. I'm addressing your question, which suggests that before Guidant acts, it has to find permission in the merger agreement. And I am resisting that characterization, saying Guidant can do what is not prohibited by the merger agreement.
THE COURT: No, but the question is, can you identify for the Court something that isn't on the Skadden memo that you're telling us Guidant could do?
THE WITNESS: Well, with the addition of the word "representatives," I did not identify anything to the board of directors at the time. And right now, I don't have a hypothetical, a something else Guidant could do. What I was resisting, your Honor is just the characterization --
THE COURT: I don't want to -- I have a sense as to why you're resisting, but I don't think that's material at this point. Go ahead, the next question.
BY MR. COFFEY:
Q. Well, back at 4.02, 4.02(A) we talked about the phrase "or

otherwise cooperate in any other way." That's a pretty broad prohibition, right?
A. To the extent that's the operative rule for engagement, it is a prohibition, yes.
Q. And is it your view that when a superior proposal -- when the board makes a determination that it has received a superior proposal, that those words, "or otherwise cooperate in any way," are now surplusage, don't matter?
A. It's my view that the operative language of the merger agreement says, notwithstanding the foregoing, in the middle of 4.02(A), which says despite the broad prohibition you're alluding to in the first half of 4.02(A), we now have a different set of rules as to what Guidant may do in response to a takeover proposal that the board has found that could be a superior proposal. And many of those actions that Guidant can do clearly facilitate, cooperate, can be deemed, if you will, to encourage.
The second half of 4.02 says once that is the operative set of rules, you can engage in discussions and negotiations and give information, all of which can be facilitative, can be encouraging and can otherwise be cooperated with a takeover proposal. So those broad prohibitions just don't obtain in the circumstances Guidant faced on December 5th.
Q. Well, let's turn to the top of Page 6227, which where the

second you've alerted us to continues. And the "notwithstanding" continues over and et cetera. But then on the third line you see where it says what the company may do. Do you see that?

Notwithstanding the prohibitions above, if it gets a takeover proposal, it deems it a superior proposal, the company may, and then it lists two things, right? And two things only, right?

A. It lists two things.

Q. Those are the two things that Skadden summarized in the -- that part of the answer that was provided in the memo given to the board on December 7th, 2005, right?

THE COURT: The two bullet points on page --

THE WITNESS: Yes.

THE COURT: -- on this memo --

THE WITNESS: Yes.

THE COURT: -- are summarizing (x) and (y) on the scene, right?

THE WITNESS: Yes.

BY MR. COFFEY:

Q. And that's what the company may do, right?

A. Yes.

Q. Those are the exceptions that are now available to Guidant from the prohibitions of 4.02(A), right?

A. Yes.

Q. And other than acting in accordance with the two parts here, (x) and (y), other than those things, Guidant remains prohibited from doing any of the other things prohibited by 4.02(A); isn't that right, sir?
A. Unless it's covered by the items following "notwithstanding," yes.
Q. So let's go back to Exhibit 65, please, Kury 65. Now, on the first bullet -- we're going to agree, I think, Mr. Mulaney, that a more fulsome description would be that Guidant could furnish information to Boston Scientific and its representatives. I think you corrected me on that, right?
A. Yes, I did.
Q. Wasn't in the Skadden memo, but it's in 4.02, right?
A. Correct.
Q. And it has a couple of things attached to that, right? It's got to be pursuant to a confidentiality agreement, not less restrictive to Boston Scientific than the confidentiality provisions of the J&J confidentiality agreement; isn't that right?
A. That's what it says.
Q. It also requires that the information had previously been given to J&J, or is provided to J&J prior to or substantially concurrent with when it is provided to Boston Scientific; is that right?
A. That is correct.

Q. And the second bullet is, to participate in discussions or negotiations with Boston Scientific. Now, one of the things that the Guidant board had to do was determine whether the 12-5 proposal from Boston Scientific constituted or was reasonably likely to lead to a superior proposal, correct?
A. Correct.
Q. And one of the things the board would have to decide is whether there was a risk that the FTC would require divestiture if Boston Scientific were to try to acquire Guidant, and if so, how Boston Scientific would propose to deal with it, right?
A. The board would have to consider whether or not the Boston Scientific offer was going to close, yes.
Q. And it could inquire, under the second bullet, it could inquire of Boston Scientific, how do you plan to deal with antitrust risk; they could do that, that's permissible, right?
A. Yes, they can do that.
Q. They could negotiate with Boston Scientific, right? They could say, you keep the antitrust risk or we're not going to go forward; they could do that, right, that's permissible?
A. They can negotiate with Boston Scientific, yes.
Q. They can say, you know, Boston, we'd like to be acquired by you; so, you know, we'll keep the antitrust risk. That could have been part of the negotiations, right?
A. Could have been.
Q. But what they couldn't do, what Guidant couldn't do, is say

let me help you fix your antitrust problem, right? They couldn't do that, right?
A. No, I don't agree with that statement.
Q. You think that's included within negotiations or discussions?
A. Well, one, Boston Scientific itself knew that to present a superior proposal that would cause the board of Guidant to give up a signed transaction with Johnson & Johnson, it would -- Boston Scientific would have to present an offer with a high likelihood of being consummated so that the Guidant board would be confident that the Boston Scientific transaction would occur.
Boston Scientific took it upon itself to try to formulate an offer in which the divestiture partner had been identified and signed up so that on January 8th it could present the kind of offer it did present on January 8th. Boston Scientific was the architecture -- was the architect of the structure of the January 8th proposal made to the Guidant board of directors.
Q. Now, that last part that you've told us about, what Boston Scientific took upon itself, that clearly was not in the December 5 proposal, right? That it was going to formulate an offer in which the divestiture partner had been identified and signed up before it made a definitive offer; that was not in the December 5 proposal, right?

A. Those words were not in the letter. It was clear from what subsequently happened that was Boston Scientific's plan, to attempt to formulate a superior proposal that would win the approval of the Guidant board of directors.

Q. Well, I think the answer to my question is, it's not in the letter, because you said it's what subsequently happened that shed light on what its intent was, right, but it wasn't in the letter?

A. It wasn't in the letter.

Q. And as part of your prior answer -- withdrawn.

You understand that the CFO of Boston Scientific has testified that they would not have moved forward with a firm offer for Guidant if they did not have a "sign on the dotted line" divestiture partner lined up; are you aware of that?

A. No, I'm not.

Q. But you're aware that Boston Scientific took it upon itself to proceed in that manner, right?

A. Yes.

THE COURT: At the time you wrote -- well, actually, these talking points, you wrote these or someone else wrote these?

THE WITNESS: I don't recall, your Honor. I might have written them myself or someone else might have written them and I reviewed them.

THE COURT: All right. At the time that these were written, which is in anticipation of a December 7th board meeting; is that correct?

THE WITNESS: That's correct.

THE COURT: Were you aware that Boston Scientific intended to make a firm offer only if they had a "sign on the dotted line" divestiture partner?

THE WITNESS: Not for a certain fact. That was my surmise, but I didn't know for a certain fact.

THE COURT: Okay. Next question.

BY MR. COFFEY:

Q. Boston Scientific ultimately, as you say, on January 8th made a -- pardon me, January 9th made a firm offer for Guidant, correct?

A. That is correct.

Q. And it had taken the tact of lining up a divestiture partner as part of its plan for acquiring Guidant, right?

A. That is correct.

Q. And that was Abbott, right?

A. Yes.

Q. There came a time when you were aware that Abbott wanted access to Guidant information in order to determine whether it would be the divestiture buyer, right?

A. Yes.

Q. And Guidant provided information to Abbott, correct?

A. Information was provided to Abbott. I don't -- as I sit

here, I don't recall whether it was provided directly by Guidant or whether it was provided by Boston Scientific.
Q. Right. Good point. The way it was arranged was that anything Abbott wanted had to go through Boston Scientific in a request; isn't that right?
A. As I said, I don't specifically recall, but my understanding is at least some information was provided by Boston Scientific.
Q. Now, if we could just show Kury 65 again, the last piece we were looking at, the two bullets. The first bullet, I've read this before, but I want to focus on the line that said Guidant was able to furnish information to Boston Scientific (and its representatives) pursuant to a confidentiality agreement not less restrictive to Boston than the Johnson & Johnson copy. Okay? I'm going to ask you some questions about that.
You understood in December of '05 that the confidentiality provisions of any confidentiality agreement between Boston and Guidant would have to be not less restrictive than those in the Johnson & Johnson confidentiality agreement; isn't that right?
A. No. The operative provision is the confidentiality provisions; so the confidentiality agreement with Johnson & Johnson.
Q. Okay. I'll reread my question and see if perhaps you misunderstood me. You understood in December of '05 that the

confidentiality provisions of any confidentiality agreement between Boston and Guidant would have to be not less restrictive than those in the Johnson & Johnson agreement, correct?
A. I'm sorry, yes. I so understood, yes.
Q. Let's turn to Kury Exhibit 2 in your binder, sir, which is the Johnson & Johnson/Guidant confidentiality agreement. I'm going to call it the J&J confi to try and save some breath and save the reporter a few taps. Would that be okay with you, Mr. Mulaney?
A. That would be fine.
Q. So Kury Exhibit 2 is the J&J confi, and I want to direct your attention to the first paragraph. Now, in the second sentence of the J&J confi, this is the sentence that refers to the possible exchange of information between the parties and the representatives. The term representatives is defined; do you see that?
A. Yes, I do.
Q. Now, let's leave to the side a moment your interpretation of what's included in the definition of representative. In your trial affidavit, you assert your belief that the definition of representatives in the J&J confi is not among its confidentiality provisions; is that right?
A. That is correct.
Q. So here we are in Federal Court, federal judge, do you

still stand by that testimony?
A. Yes, I do.
Q. And that's even though the definition of representative is defined in the very same sentence that states that the parties will be exchanging information about their respective companies with each other?
A. Even though it's in that sentence, yes.
Q. In your testimony, in your affidavit is that potential recipients of confidentiality Guidant information, the class of people who may get that information is not restricted to persons identified or defined as representatives in the J&J confi; do I have that right?
A. Yes, you do.
Q. So if I understand you correctly, the J&J confi provides for what information can be exchanged and how that information shall be handled, but imposes no restrictions on who is authorized to see it; is that right?
A. No. It imposes restrictions on who may see it in that the information can all be used to formulate a proposal, a business transaction, and can't be used for other business or competitive purposes and, otherwise, has to be kept confidential.
Q. All right. Assume all that is in this agreement with Joe, right? Let's call him Joe Smith. If Joe Smith agrees to do everything you just said, your view is the definition of

representatives doesn't prohibit Guidant from giving information to Joe Smith, right?
A. I'm sorry, Joe Smith is the person making the takeover proposal?
Q. No.
A. Who is Joe Smith?
Q. Joe Smith is outside the courtroom, and he's somebody, but we're going to pull him in and have him play a role. Right? He's not an advisor. He's not an attorney. He's not an investment banker. He's Joe.
A. I'm sorry, I guess I don't understand your question. In what context am I being asked to answer your question of whether or not we can give information to Joe Smith?
Q. If Joe doesn't fall into the categories of the definition of representative, your view is that Guidant can give him information, as long as he agrees to treat it the way it should be treated, the information, and has something to do with the transaction; is that your testimony?
A. I still don't understand your question. I don't know the relationship of this Joe Smith to someone either making a takeover proposal or not.
Q. Well, I guess the key part of the question I'm posing is he's not somebody who falls within the definition of representative. Johnson & Johnson's view is he can't get that information no matter what role he has, right? Your view is

different. Do I have that right?
A. Well, you can tell me what Johnson & Johnson's position is. Maybe a way to answer your question is, if the question is, can Guidant give information to people associated with someone making a takeover proposal broader than the category of representatives listed in the J&J confi agreement, the answer is yes.
Q. And you believe that that is consistent with the merger agreement?
A. Not only is it consistent, that's what the merger agreement provides. The merger agreement specifically says that Guidant can give information to the person making the takeover proposal and its representatives, as defined in the merger agreement, not as defined in the J&J confidentiality agreement. They are two different definitions of representatives. They are two different agreements.
Q. All right. Let's turn to the merger agreement and take a look at that. Kury Exhibit 9, go back to that again.
Would you agree with me, Mr. Mulaney, that the permission granted to Guidant under section 4.02(x) of this agreement includes a limitation on whom Guidant can give diligence to, namely to the person making such takeover proposal and its representatives; do you see that?
A. Yes, I see it.
Q. Now, those words, those words circumscribe the universe of

people to whom Guidant could give information, right?
A. Subject to the confidentiality provisions of the confidentiality agreement.
Q. What do you mean by that?
A. Well, what I mean by that is what this section of the agreement says, Guidant can give information to the person making the takeover proposal and its representatives. Once information is in the hands of the person making the takeover proposal, under the confidentiality provisions of the confidentiality agreement, Boston Scientific could give that information to another party, so long as it's being used for the formulation of a business transaction and is otherwise kept confidential and not used for business or competitive purpose.
So that if, as in the course -- if in the course of the information exchanges between Guidant, Boston Scientific and Abbott, Boston Scientific said to Guidant, would you give Abbott this information about the VI and ES business, I would think Guidant could give the information to Abbott because Guidant can give the information to Boston Scientific, and then Boston Scientific can give the information to Abbott, provided that all those provisions of information are covered by confidentiality agreements to keep the information confidential, used only for the purposes of formulating a business transaction and not used for competitive or business purpose.

Q. I think we've established that one of the two things that Guidant was permitted to do, as of December 7th, was to furnish information to Boston Scientific and its representatives. My question is, doesn't the language of 4.02(A)(x) limit the universe of people to whom Guidant can give information, consistent with the merger agreement, "to the person making such takeover proposal and its representatives," and no one else? Isn't that the limitation here?
A. I wouldn't read that as the limitation for the reasons I tried to indicate in my previous answer.
Q. So the limitation -- the words, "to the person making such takeover proposal and its representatives," your view is that is not a limitation on what Guidant can ultimately give to someone, right? I'm summarizing your prior -- the answer you gave a while ago.
A. There are limits. What I'm saying the limit is, if Guidant can give the information to Boston Scientific and Boston Scientific can give it to Abbott, then I do not believe the merger agreement is violated if, at Boston Scientific's request, Guidant gives information to Abbott itself.
Q. Now, if the Court were to conclude that Abbott was not a representative of Boston, would you agree that providing information to Abbott violates 4.02(A)(x), which limits the persons to whom information can be furnished, to the person making the takeover proposal and its representatives?

A. No, I would not for the reason I just indicated.
Q. So your view is that if representatives in the confidentiality agreement is more expansive than the merger agreement, the confidentiality agreement controls? Is that your testimony?
A. No, that's not my testimony. I'm not referencing the confidentiality agreement's definition of representatives at all in my answer or analysis at all of this section of the merger agreement. They are two distinct agreements.
Q. And the more restrictive of the two would control, correct?
A. No, the one that controls in the merger agreement is the definition of representatives in the merger agreement.
THE COURT: But, obviously, you're suggesting that if Guidant gives this information to Boston Scientific because Boston Scientific has made a takeover proposal or is likely to make a takeover proposal, that's superior to J&J? Boston Scientific can share it with anybody they want to?
THE WITNESS: They can share it with anyone that is working with them toward formulating a business transaction, protected by confidentiality provisions, not used for business or competitive purpose.
THE COURT: So they could have gone, in your view, then to Abbott and everybody else in the market to see if they would be interested in becoming their divestiture partner? They could have shared all of this due diligence material with

any and all potential divestiture partners?

THE WITNESS: Subject to the confidentiality agreement Guidant entered into with Boston Scientific and Guidant, in that confidentiality agreement, kept a string on what divestiture partners you could give information to to prevent broad and unhealthy dissemination of information, but --

THE COURT: You're saying there's nothing in the merger agreement that prohibited it from them giving it to others?

THE WITNESS: Correct, your Honor. So what I'm saying is the confidentiality agreement with Johnson & Johnson at the start does not, by its terms, prevent Johnson & Johnson from giving information to a third party, so long as it's protected and kept confidential and used only for business transaction.

And my understanding is, in the course of this transaction, Johnson & Johnson did give information about Guidant to Abbott. Abbott was the divestiture partner for Johnson & Johnson.

THE COURT: So why is it necessary, then, to list in the merger agreement a definition of representatives? By your view, you could have just said Boston Scientific, and then Boston Scientific could have figured out who they wanted to share with as long as it was for a business purpose?

THE WITNESS: Well, as long as it's for purposes of the transaction, but the definition of representatives in the merger agreement is put there initially, as in the first part of 4.02(A), to say that Guidant and its representatives may not solicit transactions.

THE COURT: But in the second part, it uses the same terms as representatives, right?

THE WITNESS: Yes, it does.

THE COURT: So why is it necessary if your interpretation is correct? Why would it not just be the person making the takeover? Guidant is authorized to provide to the person making the takeover its due diligence material, and they can do whatever they think the heck they think appropriate for the transaction?

THE WITNESS: Well, it's more fulsome permission to Guidant responding to a takeover proposal to be able to deal with and give information directly to representatives of the person making the takeover proposal. And it's more fulsome and beneficial for Guidant to be able to enter into discussions and negotiations not only with Boston Scientific but its representatives.

So it's facilitative language for Guidant, the seller, when not having solicited an offer, it gets one. And now, having not solicited an offer and kept its part of the bargain with Johnson & Johnson, it can respond and achieve what it intended to and what it thought the benefit of its bargain was.

That is to say, we only dealt exclusively with Johnson

& Johnson. We sold it to Johnson & Johnson on the premise, understanding in the negotiation that, once that deal was announced, if we were passive and got a better offer, we could deal with that party, negotiate, give information and see if that party could come up with a better bid.

THE COURT: All right. Mr. Coffey?

(Continued on next page)

THE COURT: Mr. Coffey.
Q. But you weren't allowed to facilitate that other offer, right?
A. No.
Q. You weren't allowed to make it better, right?
A. I disagree with that statement. Once a takeover proposal that the board finds to be a superior proposal, we can do what is not prohibited; and giving information, entering into discussions, entering into negotiations, facilitates, encourages, and cooperates with a takeover proposal. That is exactly what Guidant bargained for.
THE COURT: But the language of -- go to page 38. Do you have it there?
THE WITNESS: Yes, your Honor.
THE COURT: Once there has been an offer, or something that is likely to lead to an offer, then Guidant can furnish information with respect to the company and its subsidiaries to the person making such takeover proposal (and its representatives) pursuant to a customary confidentiality agreement not less restrictive to such person than the confidentiality provisions of the confidentiality agreement which was defined before.
So, your view is that they can provide this information to the takeover person and they can do with it -- they can share it with anybody they want as long as it's

connected to the transaction.

THE WITNESS: Well, subject to, as I said, in the instance of an divestiture candidate, Guidant had rights to approve those persons one at a time. But, yes, the recipient -- the person making the takeover proposal, in this instance, like Johnson & Johnson under its own confidentiality agreement with Guidant can share that information with third parties subject to the restrictions of that confidentiality agreement.

To put it another way, your Honor, the confidentiality agreement with Johnson & Johnson does not by its terms say, you, Johnson & Johnson, are getting information about Guidant; you and your representatives are getting information about Guidant; and only you and your representatives may have this information about Guidant.

THE COURT: And then with respect to the confidentiality agreement that's Kury Exhibit 2, the J&J Confi, as we call it in the biz, your view is that a definition of representatives falls outside of the confidentiality provisions of this agreement?

THE WITNESS: Correct.

THE COURT: Where do the confidentiality provisions pick up in your view?

THE WITNESS: The second paragraph which say: You can only use the information to explore or possibly negotiate a business arrangement. It has to be kept confidential.

THE COURT: But there is no header that says those are the confidentiality provisions and what went before is just puffery, so I guess I'm confused. A sophisticated player in the business would be able to look at this and say, yes, the first paragraph is just the usual nonsense but the meat of the thing starts in paragraph two?

THE WITNESS: No, not the meat of thing, your Honor. The confidentiality provision starts in paragraph two. The other reason the definition of representatives in the J&J Confi agreement is not relevant to a consideration of what Guidant may do in response to a takeover proposal that could be a superior proposal is the merger agreement has a different definition of representatives.

THE COURT: It sure doesn't have a broader one, does it?

THE WITNESS: Yes, it does.

THE COURT: You think what is in the Confi is broader than what's in the merger agreement?

THE WITNESS: No, I think what's in the merger agreement is broader than what's in the Confi.

THE COURT: But your view is the merger agreement entitles the next Confi with the takeover proponent to be infinitely larger than the confidentiality agreement that was signed with Johnson & Johnson. That's your view.

THE WITNESS: I think the merger agreement permits a confidentiality agreement entered into under the terms of the merger agreement to be consistent with the terms of the merger agreement which are broader than the confidentiality agreement with Johnson & Johnson. Broader class of representatives for one. The second is the merger agreement was only focusing on the confidentiality provisions, not the recipients of information.

THE COURT: I guess I'm trying to figure out -- I've read this thing a number of times, and it is not clear to me why you considered paragraph two to be the confidentiality provisions of the confidentiality agreement.

THE WITNESS: Because paragraph two is where it starts. There are a lot of other provisions in this agreement that go to confidentiality, such as the provider information that call for the information to come back.

THE COURT: Is confidentiality provisions defined anywhere?

THE WITNESS: It's not defined; it's specified.

THE COURT: Specified where?

THE WITNESS: Well, in the confidentiality agreement there are many paragraphs that relate to keeping information provided confidential. If you're the subject of a third party subpoena, you're supposed to notify the provider of that information so that person can try to resist the production of documents.

THE COURT: But you don't think limiting the potential recipients for this information is part of the confidentiality provisions of this agreement?

THE WITNESS: No, and especially no when you are operating under the merger agreement which has its own definition of representatives.

THE COURT: It definitely has its own definition of representatives. I guess the question is whether the term confidentiality provisions of the confidentiality agreement has any meaning.

THE WITNESS: Well, your Honor, if I may, in the course of negotiating the transaction, I think this was brought out in the course of my deposition, there was back-and-forth negotiations with this very sentence in the merger agreement because as originally drafted by Johnson & Johnson, it said we could give out information pursuant to a confidentiality agreement like the J&J Confi agreement. And we resisted that. The J&J Confi agreement, in addition to provisions about confidentiality, has a standstill. The jargon "the prohibition on J&J making an offer for Guidant unless Guidant in writing asked for it," that standstill made sense when the world didn't know Guidant was for sale, and Guidant hadn't agreed to sell itself to anyone. Once we have signed our merger agreement with Johnson & Johnson, we want to be able to respond should any one have a better offer, and we want to be able to respond, but we can't invite someone to make a written offer. We are under no-solicit clause.

So there are provisions in the Johnson & Johnson Confi agreement that make sense and are commercially reasonable dealing with Johnson & Johnson under the circumstances which no one knows Guidant is for sale and Guidant hasn't decided to sell itself to anyone. Part one.

Part two: We're @now in the merger agreement. The whole world knows Guidant is ready to sell itself at a price. Guidant may not solicit. We are restricted from soliciting, but we bargained for, and expressly won, the right to respond should an unsolicited proposal come forth that could be superior, and we want to be able to deal with that party so as to enable the stockholders of Guidant to get the highest price that's "up there in the market place."

That was the deal. We didn't solicit, but we can respond; and there are lots of provisions in the J&J Confi agreement that just don't apply. It's different circumstances.

THE COURT: My question is much more narrow. Is that you don't think a definition of the term representatives is part of the confidentiality provisions of the J&J Confi?

THE WITNESS: That's correct, especially in the context of the merger --

THE COURT: That's all I'm interested in.

Go ahead.
BY MR. COFFEY:
Q. Mr. Mulaney, the standstill provisions you spoke about and the negotiations you spoke about, that led to the qualification in the merger agreement that said not less restrictive than the confidentiality provisions of the Confi, right?
A. Yes.
Q. And the purpose of adding those words "the confidentiality provisions of" was to make clear that the standstill did not have to be in a rival bidder's confidentiality agreement, correct?
A. It clearly excluded those, yes.
Q. The definition of representative was not a standstill provision, was it?
A. No, it was not.
Q. I want to call up your trial affidavit paragraph 7 Marco, please. We are going to pull this on to one slide, the entire paragraph.
Now, it appears that the purpose of including this paragraph in your trial affidavit was to give the Court background on how the J&J Confi was created. Is that fair?
A. It was to give testimony as to interplay of the J&J Confi agreement on the one hand and the operation of the no-shop response to a superior proposal provisions of the merger agreement on the other hand.

Q. Right. But I am going to ask you some questions a little bit about this position that Confi could somehow limit or repeat proposal. What I want to focus on now is this is intended to provide the Court with background as to how the J&J Confi was created. Is that right?
A. But with the purpose of making the distinction as to how it operated in the merger agreement. The history of the Confi agreement with J&J in and of itself isn't the prime focus of this paragraph.
Q. We will come back to this paragraph in a few minutes. I would like to go back to another sworn statement you made in this case in which you alluded to the drafting of the J&J Confi. Can we call up Plaintiff's Exhibit 37, Mr. Mulaney's declaration in support of Guidant's summary judgment motion. Please turn to paragraph five.
This is more or less the same language as in the paragraph seven of your trial affidavit that we just looked at with one notable exception, and that is this highlighted sentence. That is what I want to focus on. This sentence, you'd agree with me, is not in the paragraph seven we just looked at, right?
A. That is correct.
Q. In this sentence, you state that the draft of the J&J Confi which was prepared by Skadden "did not explicitly define representatives to include financing sources or potential

divestiture parties for the simple reason that we had no understanding, and J&J never suggested, that J&J wanted or needed to share diligence with any such entities at that time; not because we had an objection to such parties being provided with due diligence if that were required as part of J&J's offer." Do you see that?
A. Yes, I do.
Q. The precise point being here that there was no need to include financing sources or potential divestiture parties in the definition of representatives given that J&J had not expressed any need for including them, right?
A. Yes. And also in the confidentiality agreement the first use of the word representatives is with respect to who is providing information. The second use is with respect to who is receiving it. So in the sense of defining who is providing the information, financing sources and divestiture candidates just didn't apply.
Q. But it also applied to who was getting information, right; not just who was giving, right?
A. Representatives applied in both instances, yes. I'm just explaining the first ways to find and why.
THE COURT: You're talking about the merger agreement?
THE WITNESS: No.
THE COURT: The Confi?
THE WITNESS: The Confi agreement, your Honor.

Q. The larger point you seek to make here is the term representative determined who could get information, right?
A. It determined who would be providing the information and who might be receiving it.
Q. Right. So the term representative determined who would be receiving information?
A. Right. But as we previously discussed, that did not limit the universe of people that may in addition ultimately receive the information provided.
Q. So the term representatives was sort of a "oh-by-the-way-for-your-information" type provision. It wasn't a limit. Is that your testimony?
A. My testimony, and my understanding of Johnson & Johnson's own conduct with respect to Guidant information, is that Guidant information given under the confidentiality agreement could be shared with other parties by the recipient provided it was protected under appropriate confidentiality protections.
Q. Was it a limit or not, Mr. Mulaney?
A. It was limited in that it had to be kept confidential.
Q. In fact, you put this in your June 2011 declaration because at that time you wanted the Court to understand why financing resources and potential divestiture parties weren't included in the definition of representatives because representatives was a limit, right?
A. No, I didn't view representatives as a limit. I was trying

to make the point that the confidentiality agreement with Johnson & Johnson was written under the circumstances of a negotiation with Johnson & Johnson, and the confidentiality provisions called for under the merger agreement are written with respect to a different set of circumstances.
Q. Leaving aside why the words financing sources and words to the effect of potential divestiture parties were not included in the Johnson & Johnson confidentiality agreement signed in 2004, you would agree with me that those two sets of words are not in the definition of representatives in the J&J Confi, correct?
A. Those words are not in the definition, that's correct.
Q. Turning to the negotiation of what I will call the Boston Scientific Confi, and by that I will mean the Boston Scientific confidentiality agreement. Are you with me on that?
A. I believe I am, yes.
Q. Now, the Skadden corporate partner who took the lead on the Boston Scientific Confi was Brian Duwe. Isn't that right?
A. He was principally involved, yes.
Q. You did not negotiate that agreement, correct?
A. I didn't directly negotiate it. I spoke with Brian Duwe about it at the time it was being negotiated.
Q. Isn't it correct, Mr. Mulaney, that Mr. Duwe and the lawyers from Shearman & Sterling who were working on the Boston Confi, they understood the term representatives defined the

parties with whom Guidant could share information. Isn't that right?
A. They understood they were negotiating a confidentiality agreement which was identifying the parties that could receive information from Guidant under the terms of that agreement; that's what they understood.
Q. And those parties, there would be a limit to those parties, and the limit would be prescribed by the definition of representatives. Isn't that correct?
A. The definition of representatives was what it was. You keep wanting to say there's a limit as to who can get the Guidant information by the terms of the confidentiality agreement. I think as we discussed various times, confidentiality agreement with J&J and confidentiality with Boston does not by its terms prohibit the recipient from sharing that information with a third party so long as that information is protected and kept confidential.
Q. So then based on your testimony, there would be no need to add language to the definition of representative because it's not a limit. Do I understand that to be your position?
A. The provision of information to third parties is limited by a confidentiality agreement and the confidentiality provisions thereof. You asked me about the negotiation of representatives with Boston Scientific and in negotiating that agreement, the definition of representatives was tailored to take account of

the realities of Boston Scientific's situation, which was, one, they needed financing; and, two, they indicated they wanted to identify a divestiture candidate for business of Guidant that needed to be sold to facilitate antitrust approval.
Q. Well, didn't Mr. Duwe and the Shearman lawyers discuss that they would like to add to the term representatives "parties with whom they could share information"?
A. They added to the definition of representatives in the Boston Scientific Confi agreement.
THE COURT: Do you recall discussions about this?
THE WITNESS: Yes, I do.
Q. And they did so because they felt they needed to add to the term in order to expand the number of people who could get Guidant information. Isn't that true?
A. We were making explicit what was implicit or permitted by the merger agreement, we were taking account of the realities in Boston Scientific's situation, that they had financing sources and would want due diligence; and in defining the class of people in addition to Boston Scientific that would be provided information we included financing sources.
Q. Why don't we call up Duwe Exhibit 1?
THE COURT: Why is it necessary to do that if you thought that Boston Scientific could share with anybody they thought was necessary to the deal?
THE WITNESS: Well, one, because Guidant may be

providing that information directly to the financing sources. Your Honor is correct in that it wasn't strictly necessary, but we were describing and facilitating what exactly is going to happen with respect to providing information to Boston Scientific knowing their circumstances, which are different than the circumstances that pertained when we provided information to Johnson & Johnson.

Q. Let me just focus on that. The circumstances are different. So you needed to do a bit more for Boston Scientific than you had to do for Johnson & Johnson?

A. We did something differently.

Q. And what you did was make the confidentiality agreement less restrictive, isn't that right, Mr. Mulaney? When you added to the definition of representatives "financing sources" and "potential divestiture partners," it less restrictive. Isn't that right, sir?

A. Let's return to representatives that may receive information at this point are defined by the merger agreement, not the J&J Confi agreement.

Going to the J&J Confi agreement is not the definition of representatives that is relevant here. The definition of representatives that is relevant as to whether or not on the merger agreement were permitted to give information to Boston Scientific and its representatives is the definition of representatives in the merger agreement.

Q. Notwithstanding the language in 402-AX, the confidentiality agreement could be a vehicle through which you could add other people who could get access to the information, right? That's your testimony?
A. I'm testifying that 4.02(a) by its very terms says, we may give information to Boston Scientific and its representatives, and the operative definition of representatives is in the merger agreement. It is not in the J&J Confi agreement.
THE COURT: Right. But you are saying also that Boston Scientific once they have these things, in other words, once Guidant has given to Boston Scientific, Boston Scientific can give it to people beyond those defined as representatives in the merger agreement.
THE WITNESS: That's correct, your Honor.
Q. Let's take a look at Duwe 1 and see how we square that testimony with how Mr. Duwe and Sherman & Sterling proceeded. You see the highlighted language in this email from Brian Duwe to Mr. Kury, and he is discussing that he had spoken with Shearman & Sterling on the Boston Confi, and they had a couple of points on the no solicit that just take it back to what was essentially agreed with J&J. Do you see that right before the highlight?
Then the highlighting is "in addition, they would like to add to the term representatives with whom they can share information third parties reasonably accepted to Guidant who

Boston identifies as potential purchasers of the assets to be divested and I would add execute a Confi reasonable to us" do you see that?

A. Yes, I do.

Q. So what Mr. Duwe is saying is that Shearman wants to add to the term of representatives "with whom they can share information." Isn't it reasonable to conclude that Mr. Duwe believed that representatives circumscribed who could get Guidant information?

A. What Mr. Duwe believed is that he had gotten a request from Boston Scientific to add language which is permitted by the merger agreement.

Q. Where does it say which is permitted by the merger agreement? That's your view, isn't it?

A. That's my view having discussed the topic with Mr. Duwe at the time, yes.

THE COURT: Do you recall discussing with Mr. Duwe at the time?

THE WITNESS: Yes, I do your Honor.

THE COURT: Are you aware of any memory problems Mr. Duwe has?

THE WITNESS: I'm not aware of his testimony, your Honor. I remember talking to him at the time. I remember he told me he had had a conversation with Claire O'brien of Shearman & Sterling regarding these matters when we talked about it.

THE COURT: All right. I'm glad somebody remembers. Go ahead, next.

Q. Now, based on what I understand of your testimony, this is all make work, right? It's not necessary to do this because they could do it anywhere. Do I have that right?

A. I don't know that it's make-work. I think what Shearman & Sterling is focusing on is the realities of what they want to accomplish in terms of getting information and what people are providing on it. I don't think at this point Shearman & Sterling was focusing on the question of once they get information. Under the terms of this agreement, are they permitted to give it to a third party?

Q. Well, you'd agree with me that the corporate lawyers of Shearman & Sterling are fine, experienced corporate lawyers?

A. That's my experience, yes.

Q. Right. Skadden worked off the J&J Confi as it prepared the Boston Confi. Isn't that right?

A. That's correct.

Q. And they sent that over to Shearman & Sterling, right?

A. That's correct.

Q. Presumably the fine corporate lawyers at Shearman & Sterling read the definition of representatives and they came back to Brian Duwe and said with regard to the term representatives, we would like to add a term to

representatives, right?
A. To the definition of representatives, yes. Yes, they did.
Q. I stand corrected. This is actually to add the divestiture parties. My apologies.
So let me back up a bit and make sure the record -- we can clean up the record I just made cloudy. The Sherman lawyers read the confidentiality agreement, and they came back to Mr. Duwe and said with regard to the term representatives, we want to add language that said we can give it to potential purchasers of the assets. Isn't that correct?
A. Yes, they did.
Q. Now, there would be no need for Mr. Duwe to be raising this unless the definition of representatives in the confidentiality agreement limited the recipients of Guidant information. Isn't that right?
A. But the definition identified various people, the focus assist was to write a confidentiality agreement particular to the Boston Scientific realities. I don't think the lawyers at the time were focused on the separate topic we've discussed, which is, once you've got this confidentiality agreement in place and the definition of representatives that you're working with, is Boston Scientific able to give information about Guidant to third parties if it keeps it confidential? I don't think they were addressing that question. It is focusing on the specifics what they knew what was coming, once this was

signed, as financing sources wanted due diligence and divestiture candidates wanted due diligence.

THE COURT: I want to understand something. Your view is that a confidentiality agreement is not focused on limiting who can receive the information?

THE WITNESS: It's focused on who's giving it and who's getting it. In this case, it's who's getting it.

THE COURT: But you said that the definition of the "who" is not part of the confidentiality provisions of the J&J agreement, right? Isn't that what you said before?

THE WITNESS: Yes, because the definition of representatives that operates once you're in a merger agreement is within the merger agreement definition.

THE COURT: But, again, a confidentiality agreement is, I would think is designed to restrict the who, what and how of sharing information. Is that correct?

THE WITNESS: It defines who is going to be provided the information and it defines what the recipient of the information may do with that information.

THE COURT: But the "who" is not part of the confidentiality provisions of the agreement in your view?

THE WITNESS: Correct.

THE COURT: OK.

Q. Mr. Mulaney, just again to clarify something I may have misspoke about, it was Skadden that added the words "financing

sources" to the draft Boston Confi before it went to Sherman. Isn't that right?
A. I believe that's correct.
Q. But you did know at the time that the Boston Confi was being prepared that Boston in its December 5 proposal had informed Guidant that it had all of the financing commitments it needed from its investment banks, right?
A. They said they had commitments from the financing sources. What the conditions of those commitments were, I think we were -- I don't know if we knew them or we were in the course of learning them.
Q. Didn't Boston specifically say that their proposal was not subject to any financing condition? Do you want to go back and look at the letter?
A. No. I recall that. That's in the letter. That doesn't mean that the Guidant board of directors isn't quite interested in who the financing sources are and what the conditions of that financing are, because Guidant did not want a lawsuit against Boston Scientific for failing to close. They wanted a closing.
Q. I'm just re-reading your testimony. That doesn't mean that the Guidant board of directors isn't quite interested in financing. Are you suggesting that financing sources was put in the Confi by Skadden because the Guidant board had a concern about whether the financing sources might later claim they were

misled?
A. No. What I said was the Guidant board of directors at the end of the day when they got an actionable proposal from Boston Scientific would be quite interested in who was providing the financing and what the conditions of that financing were separate and apart from the fact that the merger agreement itself did not have a financing condition because while if Boston Scientific didn't get the money for some reason, we could sue them. We did not want a lawsuit. We wanted a closing.
Q. Well, why not have a lawsuit? Instead of closing. You said "We didn't want a lawsuit." Why not sue? In your affidavit you suggest that Johnson & Johnson, if it really believed there was a breach, should have sued. So I'm curious now why you say we didn't want a lawsuit; we wanted to close. Do you see any reason why Johnson & Johnson wouldn't take the same position?
A. If Johnson & Johnson wanted a closing and not a lawsuit, they could get a closing if they thought they had a grievance by filing a lawsuit.

When Guidant thought its merger agreement was being breached by Johnson & Johnson improperly claiming their material efforts changed in their ability to walk away, we gave them notice of a breach and we sued because we wanted the closing, not a lawsuit. Sometimes you need a lawsuit to try to

get to the closing.
Q. Right. Well, we will come back to that in a little bit. The Boston Scientific Confi was executed on or about December 7, 8, that time frame, right?
A. That time frame, yes.
Q. And at that point what you knew with regard to financing sources was that Bank of America and Merrill Lynch had made financial commitments and said that they had -- it was not subject to any financing condition, right?
A. I was aware that Boston Scientific told us they had financing commitments and I was aware that their proposal letter said that their proposal did not have a financing condition, but I was not aware that the financing commitments were unconditional.
Q. But you were aware that the banks that had been identified in the December 5 proposal were Merrill Lynch and Bank of America right?
A. Yes.
Q. And those were investment banks, right?
A. No. Bank of America at the time was a commercial bank. It was not an investment bank.
Q. It was a bank. They were banks, right?
A. It was a commercial bank yes.
Q. And they were financial advisors to Boston Scientific?
A. I don't know if Bank of America was a financial advisor to

Boston Scientific.
Q. Now, with regard to the drafting of the Boston Scientific Confi, you state in your trial affidavit -- you could look at it; it's in paragraph 15 if you want -- you use the pronoun "we" when referring to who made the modifications to the draft. Again, you did not negotiate the Boston Confi, is that right?
A. Didn't negotiate it directly. I was aware of and participated in the discussions around the negotiation.
Q. Am I right that you have no recollection of giving any advice to Mr. Kury on whether adding financing sources to the definition of representatives was consistent or inconsistent with the merger agreement?
A. I believe my testimony was at the time this confidentiality agreement was being negotiated with Boston Scientific, I don't recall a discussion with Mr. Kury at that time about the confidentiality agreement.
Q. Are you suggesting that you discussed it with him at some other time?
A. Yes. Subsequent to entering into the Boston Scientific confidentiality agreement, I had a number of discussions with him regarding ongoing discussions with Boston Scientific and the provision of due diligence materials to parties requesting it.
Q. I'm making my question a little broader than just financing sources. Did you ever have a discussion with Mr. Kury

regarding whether the -- withdrawn.

Now, back to Duwe 1, please. You say in your affidavit that the -- "modification" is the word you used.

-- the modification that Skadden made to add potential divestiture purchasers was made at the request of Boston's counsel at Sherman & Sterling. Do you recall that is your trial affidavit?

A. Yes.

Q. Obviously Shearman & Sterling didn't think financing sources would cover a divestiture party, right?

A. No, I don't agree with that statement.

Q. You don't think that flows? They got a draft from Skadden that had financing sources in it, and they came back and said we would like to add to the definition of representatives "the divestiture party." You agree with the inference from that that Sherman didn't think that financing sources was adequate to cover a divestiture party?

A. What I understand is they wanted to make explicit divestiture candidates but also people with whom they wanted to give information. If we'd had a conversation whether or not someone paying over $4 billion for a business is the financing source for the Boston Scientific bid, I have no doubt Shearman & Sterling lawyers would acknowledge that that divestiture purchaser is providing financing for the acquisition.

THE COURT: But in your view, this wasn't even necessary at all to define financing sources or divestiture parties or deli owners wouldn't really have been relevant. As long as it was being used for the good of the deal, go team, that was sufficient?

THE WITNESS: As long, your Honor, as it was within the definition of representatives from the merger agreement, yes.

THE COURT: So surplusage; this was just nerdy lawyers doing things they do, but it really wasn't necessary?

THE WITNESS: It was making explicit what you could otherwise say is implicit, but as someone who suffers with merger agreements, there's lots of duplication in a merger agreement, your Honor.

THE COURT: All right.

Q. That's because it's better to be safe than sorry?

A. Generally.

Q. Now, you stated in your trial affidavit that the proposal to include divestiture parties, potential divestiture parties was acceptable to Skadden from both an antitrust perspective and under the J&J agreement, right?

A. Yes.

Q. Now, again to be precise, the modification to add potential divestiture parties was not made by you, right?

A. It was made by us at the request of Shearman & Sterling.

Q. Now, it was's Ian John and Neal Stoll who concluded on

Skadden's behalf that the addition of divestiture parties to the definition of representatives was acceptable from an antitrust perspective, right?
A. That's what Mr. Duwe is saying in this email, yes.
Q. They weren't corporate lawyers?
A. Sorry?
Q. They were not corporate lawyers?
A. They are not corporate lawyers.
Q. They did not give Guidant advice on what was consistent or inconsistent with Guidant's obligations under the merger agreement. Isn't that right?
A. Well, they would in the sense of an antitrust component to it, but not in the corporate sense of complying with merger agreement terms.
Q. They weren't opining on whether they were OK with this from the perspective of Section 4.02, right?
A. I don't believe so.
Q. In this instance neither was Mr. Duwe, right?
A. No, I don't agree with that.
Q. Let's pull up Duwe 1. You see in the highlighted sentence, Mr. Duwe is reporting to Mr. Kury that "Ian and Neal are OK with the addition to representatives described." Then he goes on to add "and the other changes are fine with me."
Do you see that?
A. Yes, I do.

Q. "Other" suggesting other than the words that just preceded in the sentence, right?
A. I think it does suggest that, yes.
Q. It suggests that Mr. Duwe was not opining on the addition from 4.02 perspective, right?
A. No, I don't agree with that. When a partner of Skadden, Arps sends the general counsel of a client a document saying it's ready for signature, let's get it wrapped up, that communication indicates that Skadden, Arps -- in this instance knowing Mr. Duwe, knowing my discussions with Mr. Duwe at the time -- Mr. Duwe is telling Mr. Kury that Skadden approves this document and he can execute it. And Mr. Duwe at the time is addressing the general counsel of Guidant, who happens to be Bernard Kury, former M and A partner of Duwe Ballantine, a very experienced lawyer, experienced in public company deals, experienced in merger agreements, he knows about no solicit provisions; he knows about superior proposal; he knows about confidentiality agreements. He would not expect to get a document for his signature if Skadden didn't approve it.
Q. Now, Mr. Duwe is telling him two things, right? He's telling him, one, that Ian and Neal are OK with the addition to representatives described. And the second is, "and the other changes are fine with me." Your testimony is Mr. Duwe is providing advice that pursuant to 4.02, this addition to representatives is fine. Is that your testimony?

A. I'm saying Mr. Duwe is transmitting a document for signature by the client to an experienced general counsel saying, "We are prepared to get this wrapped up."

Q. So it's the act of transmission that constitutes the advice?

A. No, it's the course and dialogue with a client over the period of months in the course of a transaction, documents are going back and forth. Drafts of letters and notices are being provided. And when we provide the client with a document and say it's ready for signature we can get it wrapped up, we are approving it. We are saying what's being done are consistent with your obligations under the merger agreement, and I assume there probably was dialogue as well. There's emails between Brian Duwe and Bernard Kury at the time. But whether there was or wasn't, I'm quite confident Bernie Kury understood Skadden was saying this agreement is consistent with the merger agreement.

Q. Now, the Boston Scientific Confi, that is not something that had been going back and forth for months, right? This is in the period of a day or so, right?

A. Correct.

Q. If we wanted to understand what Mr. Duwe's interpretation of the words here and what his recollection is about what he intended here, he would have to ask Mr. Duwe, wouldn't we?

A. I think so.

Q. And hope for the best in terms of his recollection?
A. Is that a question?
Q. I'll withdraw it.
You don't recall any specific discussion with Mr. Duwe whether adding these provisions to the definition of representatives was consistent with requirement in Section 4.02(a) that the confidentiality provisions of the Boston Confi had to be not less restrictive than the J&J Confi. Isn't that right?
A. I'm not sure I understand the question.
Q. You don't recall any specific discussion with Mr. Duwe whether adding financing sources and divestiture parties to the definition of representatives was consistent with the requirement in Section 4.02(a) that the confidentiality provisions of the Boston Confi had to be not less restrictive than those in the J&J Confi. Isn't that right?
A. I recall a number of discussions with Brian Duwe about the Boston Scientific confidentiality agreement and the provisions of it, and its consistency with the merger agreement.
Did we expressly discuss whether it's consistent with what I'm calling the confidentiality provisions of the confidentiality agreement? I don't recall.
THE COURT: Did you ever have a conversation with Mr. Duwe where you explained to him as you have to me that representatives, the definition of representatives in the first

paragraph isn't part of the confidentiality provisions?

THE WITNESS: No, your Honor, because my statements are that the definition of representatives in the J&J Confi agreement aren't part of the confidentiality provisions of the J&J agreement.

THE COURT: Right, but did you ever have a conversation with Mr. Duwe when he was negotiating the Boston Scientific confidentiality agreement that there is no need really to worry about the definition of representatives; it ain't part of the confidentiality provisions. Stop worrying your pretty little head over this.

THE WITNESS: We didn't discuss it in those terms at that time, your Honor.

THE COURT: OK.

MR. COFFEY: Your Honor, I'm going to turn to a slightly different topic.

THE COURT: Why don't we take a short break. Everybody can use a rest room. We can pick up again in about ten minutes oar so. Thanks.

(Recess taken)

THE COURT: Okay. Let's resume.

MR. COFFEY: Thank you, your Honor.

BY MR. COFFEY:

Q. Mr. Mulaney, let's take a look at paragraph 8B of your affidavit, which is DX167, and I'm going to be directing your attention to the last sentence in paragraph 8B.

Now, my next set of questions deal with your position that appears quite a number of times in your trial affidavit that suggests that J&J's interpretation of the confidentiality agreement would operate as a limitation or impediment on the type of takeover proposals that Guidant could consider. And your position that that would be inconsistent with what you call the passive market check for Guidant. Is that a fair summary of the point you seek to make in 8B?

A. Not just the definition of representatives in the confi agreement with J&J, but the definition of representatives in the merger agreement as well.

Q. And as I understand it, your position is the parties did not intend that the definition of representatives in either the merger agreement or the J&J confi would operate as a limit or impediment on the type of takeover proposals that could be considered and responded to, right?

A. That is correct.

Q. But the definition of representatives in those documents, it doesn't address what kind of offers Guidant could consider,

right?
A. It doesn't describe offers. It describes classes of people.
Q. Well, it doesn't say anything about what kind of offers Guidant can consider, right? What it deals with is who can get Guidant information prior to termination of the J&J merger agreement; isn't that right?
A. It doesn't describe kinds of offers that Guidant may consider, yes, that is correct.
Q. It pertains to dissemination of information, not types of offers, correct?
A. That is correct.
Q. Right. Let's go back to your June 2011 declaration, PX37, please. Again, paragraph 5, and, again, the highlighted sentence that appears in that sworn statement.

Now, again, the point you make here is that the terms financing sources or potential divestiture parties were not included in this because J&J didn't ask for it, right?
A. Yes.

THE COURT: But they didn't have to ask for it, in your view, I think, as I'm understanding what you said earlier this morning?

THE WITNESS: Ultimately, no, but the -- initially, representatives in the confi agreement is defining the class of people that are providing the information and the class of people that are receiving it.

THE COURT: Right. But I thought you said a moment ago that, as long as it was in furtherance of the deal, they could share with anybody they thought was appropriate. Is that wrong?

THE WITNESS: That's not wrong, your Honor.

THE COURT: Okay.

BY MR. COFFEY:

Q. Now, back in 2004, Johnson & Johnson could have asked that the definition of representatives in the confi include making information available to potential divestiture parties, right? It could have asked that?

A. It could have asked that.

Q. And Guidant might or might not have agreed, right?

A. Guidant might or might not have agreed. I doubt they would have agreed. As I said, for the reasons I gave earlier, at this point, no one knew Guidant and Johnson & Johnson were talking.

Q. But in any event, your recollection is that Johnson & Johnson never asked, right?

A. Johnson & Johnson never asked.

Q. And that's because Johnson & Johnson had decided to proceed with the acquisition while retaining antitrust risk, right?

A. That's because Guidant was not prepared to allow -- Guidant was not prepared to allow Johnson & Johnson to start talking to

third parties in the industry about divestiture candidates unless and until Guidant had a signed merger agreement with Johnson & Johnson.
Q. Okay. Let me make sure I am clear. In 2004, Guidant's position was, J&J, you need to sign an agreement before we will allow you to talk to divestiture candidates; is that right?
A. Our position is, you can't start talking to third parties about buying assets from us at this stage of our negotiations, yes. No one knows we're even talking about a transaction. We're a public company. No one knows were in discussions. No one in our business organization, except a select number of people, even know we are having discussions with Johnson & Johnson. You can't go out in the industry and try to start selling some assets and create a lot of chaos for Guidant as to whether or not it's going to be an independent company or bought by Johnson & Johnson or whatever.
Q. I appreciate the elaboration on why. My question is, in 2004 Guidant's position was that J&J had to have a signed merger agreement before it would be permitted to disclose information to potential divestiture partners; isn't that right?
A. It wasn't our position in that sequence because Johnson & Johnson couldn't talk to any third parties. It wasn't -- we didn't express it in those terms. We were negotiating a transaction with Johnson & Johnson. We did not want it leaked,

unless it was a signed deal.
And as part of that negotiation, there was an antitrust risk, and the question is what undertakings would J&J make to us to assure us that they would get antitrust approval.
Q. So J&J had to assume the antitrust risk in connection with the initial merger agreement, right?
A. They assumed a considerable part of it. It was something short of a "hell or high water" undertaking.
Q. Now, so just to be clear, in the J&J confi, Johnson & Johnson never sought permission to be able to give information to potential third-party divestiture parties to assist its antitrust issues before it had a definitive agreement with Guidant; do I have that right?
A. We never discussed with them them giving information to divestiture parties before we had a signed agreement, that's correct.
Q. Johnson & Johnson never sought permission to be able to do that, right?
A. I don't believe they did.
Q. Yet, your position is that Johnson & Johnson should have understood that a subsequent rival bidder would have that opportunity before it had a signed merger agreement with Guidant; is that your position?
A. Yes, because of the terms of the merger agreement they negotiated with us.

THE COURT: Well, the merger agreement doesn't expressly say that, right? It doesn't expressly say that a third party takeover proposal agent would be able to go to line up a divestiture partner, does it?

THE WITNESS: Correct. It doesn't expressly say that, but, your Honor, if I may, Johnson & Johnson, after they signed the merger agreement, did start talking to divestiture candidates and provide them with Guidant information.

BY MR. COFFEY:

Q. Well, you'd agree what we're here on trial about is what occurred before Boston had a signed merger agreement with Guidant, right? So what Johnson & Johnson did after it had a signed merger agreement is beside the point, isn't it, Mr. Mulaney?

A. Not beside the point because whatever they did, they had to do pursuant to the confidentiality agreement.

THE COURT: Well, did you ever have a conversation at Johnson & Johnson or on behalf of Johnson & Johnson in which you expressed the view that Boston Scientific, or anybody else, would be allowed to line up divestiture partners before they had a merger agreement?

THE WITNESS: We didn't have that express conversation, your Honor, but in negotiating for the ability to respond to a better offer, should it come forward, because we only negotiated with Johnson & Johnson ahead of time, what was clearly foreseeable among the parties was the likely intervenors would be in this industry and they would have antitrust problems, as Johnson & Johnson had antitrust problems, as Medtronic predictably would have antitrust problems, and as Boston Scientific predictably would have antitrust problems, and as other potential parties in this industry that might be interested in buying Guidant.

So the best buyer for Guidant is someone who is in the industry with the greatest potential for synergies in the acquisition. So it was foreseeable for both parties that there was someone that was going to intervene and pay our value higher than Johnson & Johnson, they would likely be in the industry, and like Johnson & Johnson, there would be antitrust problems that would have to be navigated.

THE COURT: Right. There was no discussion, however, about whether the person making the takeover proposal could line up divestiture partner or couldn't line up a divestiture partner prior to making the takeover proposal?

THE WITNESS: That's correct, your Honor. There's no express discussion along those lines that I recall.

THE COURT: All right. Go ahead.

BY MR. COFFEY:

Q. Now, in obtaining Guidant's agreement to section 4.02, including that any -- provision that any confidentiality agreement with a rival bidder would be not less restrictive

than J&J's confi, Johnson & Johnson simply wanted to make sure that any rival bid that came along would not have advantages that J&J itself did not have; isn't that right?
A. No.
Q. So you said this before, the circumstances were different. So Johnson & Johnson, Guidant would not have allowed them to provide a divestiture party with information prior to having a signed agreement, but it was okay for the next rival bidder to do so; is that your testimony?
A. Yes, because once we have -- Guidant and Johnson & Johnson signed an announcement agreement, it was public knowledge, and Guidant would have to live with the business consequences of being a company that was being sold, and the business would suffer whatever disruption and distraction, all that entails. And there was no need to be concerned with some other industry player being aware of the fact that Guidant was being sold. That was public knowledge.
Q. But nothing in the confi or -- the J&J confi or the merger agreement precluded the rival bidder from doing what J&J did, right? Which is, come in and say, we'd like to sign a merger agreement and, by the way, before we close, we're going to have to deal with the antitrust risk, but we're willing to do it, hell or high water. Nothing in the merger agreement or the Johnson & Johnson confi precluded that scenario, right?
A. Nothing prevented it, but the merger agreement also

required that before Guidant could terminate the Johnson & Johnson agreement for a superior proposal, the board had to determine that the superior proposal was reasonably likely to be completed, taking into account financial and regulatory issues.

So a burden on the Guidant board, before it could terminate the agreement, is to reach the conclusion that the intervening bid is reasonably likely to be completed, taking into account financing and regulatory concerns.

So as I say, what was clearly foreseeable to the parties at the time the merger agreement was negotiated is that if there would be an intervenor, it would likely be in the same industry and have some measure of antitrust problems, the same way Johnson & Johnson itself did.

Q. Now, Boston could have made a firm offer with a joint proposal, right, with a divestiture partner? They could have presented a firm. One of the options was to present a joint takeover proposal with the divestiture party, right?

A. Are you talking about December or December 5 or January 9?

Q. Ever.

A. That was one of their options, yes.

Q. All right. They could have come in with a -- and told the Guidant board, we have Abbott lined up, and they haven't had diligence yet, but they're agreeing to buy it subject to due diligence after we have a merger agreement? They could have

pursued that avenue, right?
A. Yes, they could have.
Q. So you would agree that there were a number of ways to proceed, other than having diligence provided to Abbott before Boston Scientific made its firm offer, right?
A. Other courses could have been followed, yes.
Q. You mentioned before something about the Guidant board wanting to get the highest price. Let's be clear. That's -- the Revlon rule doesn't apply to an Indiana corporation, right?
A. It doesn't apply to an Indiana corporation, but that doesn't mean that a board of director's intention in selling a company is to get the highest price, whether it's subject to the Revlon rules or subject to some other set of rules.
Q. And just for the record, could you tell us briefly what the Revlon rule is?
THE COURT: I know what the Revlon rule is. Do you think we need to make a record on that?
MR. COFFEY: No, we don't, your Honor. Thank you.
THE COURT: I'm not as dumb as I look. Some might disagree, I suppose.
MR. COFFEY: I was actually trying to learn what it was, but that's all right.
BY MR. COFFEY:
Q. Now, if you'll turn to paragraph 24 in your trial affidavit, please. Now, in the first sentence you mention that

it's normal and customary that Guidant would want to do diligence before a multi-billion dollar purchase, and an issue which I can state Johnson & Johnson does not disagree.

But the next sentence says, additionally, it was evident to anyone experienced in public company deals, that Boston Scientific's December 5, 2005, public disclosures regarding a divestiture meant that there would be another party, a divestiture candidate, who would need to conduct due diligence; do you see that?

A. Yes, I do.

Q. Right. But we've already established there was nothing in the December 5 proposal that said that divestiture had to be lined up before Boston would make a firm offer, right?

A. There was nothing in the letter that said that, but as you contemplate Boston Scientific's financing for its takeover proposal, part of the financing was divestiture proceeds, which meant they needed that financing lined up when they made the offer.

So while Boston Scientific could have formulated an offer in a different way, the offer they did formulate required divestiture proceeds, some $4 billion, among other things, to formulate their January 9 offer. So the divestiture was an integral part of their proposal, and it was an integral part of financing their proposal, in addition to being an integral part of solving their antitrust problem.

Q. But you agree with me that the December 5 proposal said nothing about Abbott, right?
A. It said nothing about Abbott.
Q. It said nothing about the timing of when a divestiture purchaser would be lined up, right?
A. I don't believe it did. I believe the analyst's called Boston Scientific had after it issued a press release, indicated that the divestiture would be a source of financing for the transaction. I believe that that is the case.
Q. You believe that's in the December 5 proposal?
A. I did not say it was in the December 5 proposal. I thought it was something the Boston Scientific executives alluded to or said in their analyst's call following the press release announcing their December 5 proposal.
Q. Now, the fact that Boston had publicly stated in December that it intended to do a divestiture at some point and that that would be evident to anyone experienced in public company deals, that didn't give Guidant license to give diligence to a potential divestiture party, if doing so before the J&J merger agreement that had been in force had been terminated, did it?
A. The fact that a divestiture purchaser would want something doesn't necessarily mean it complies with the merger agreement, if that's your question, the answer is yes.
Q. And whether the rival bidder needs or gets due diligence before it signs a binding agreement is not the issue here, is

it?
A. I thought it was the issue here.
Q. Well, isn't the issue whether such due diligence could be provided before the agreement with J&J was terminated, right?
A. My understanding is that's the issue, yes.
Q. Now, you say in a couple of places in your trial affidavit that -- words to the effect, that Johnson & Johnson should have anticipated that diligence was being provided to potential divestiture parties; isn't that right?
A. I think the paragraph you just indicated said a knowledgeable observer would so anticipate.
Q. Right. It was obvious? J&J should have figured that out?
A. I believe J&J figured that out. They, themselves, had gone through divestiture and, indeed, they had lined up Abbott itself as one of their the divestiture candidates.
Q. That was after J&J merger agreement had been signed, the initial one, right? Their divestiture agreement that involved Abbott took months after the initial J&J/Guidant merger agreement had been signed, isn't it?
A. Yes, but you know, that's totally irrelevant to whether or not Johnson & Johnson was, at that time, after the merger agreement was signed, subject to the confidentiality provisions of the J&J confi.

And 5.02 of the merger agreement says, the merger agreement having been signed, Johnson & Johnson may request additional information from Guidant, but all that Guidant information remains subject to the confidentiality agreement, which confidentiality agreement survives termination of the merger agreement.

So if, following the signing of the Johnson & Johnson agreement, Johnson & Johnson provided Abbott with information about Guidant, they had to do so consistent with their confidentiality agreement with Guidant. And if they did so, they did so on the reading of the confidentiality agreement we've discussed previously, to wit, the recipient of information may give Guidant information to another party so long as there are protections of confidentiality in that provision.

Q. Are you finished with your answer?

A. I am finished.

Q. My point of bringing up the Abbott point was the timing of the Abbott, was that it was after there had been a merger agreement signed with Johnson & Johnson, right? Timing-wise, all that took place after there was a merger agreement?

A. But your relevance of whether or not the confidentiality agreement was complied with or violated by Johnson & Johnson's conduct, that is the point of my answer. The signing of the merger agreement doesn't change the rules of engagement with respect to Guidant information in the hands of J&J.

Q. Now, again, back to this point that J&J should have

anticipated that information was being given to potential divestiture partners. Didn't your partner, Neal Stoll, advise Mr. Kury that Guidant should not give information to potential third-party purchasers until after there was a definitive agreement between Guidant and Boston?
A. I don't recall Mr. Stoll making a statement to that effect to Mr. Kury.
Q. Why don't we pull up Kury Exhibit 68, please. I'll start with the lowest e-mail, yes.
So you're cc'd on this e-mail and Alison Rhoten, who was the corporate associate on the deal, right?
A. She was one of them, yes.
Q. And Bean is Boston Scientific, correct?
A. That is correct.
Q. And Alison wrote, reporting to Bernie Kury and cc'ing Mr. Stoll, Mr. John, yourself, and Mr. Duwe and saying that Boston seems to be pushing to get confidentiality agreement signed up with potential acquirers of divested VI and ES businesses; do you see that?
A. I see the first e-mail, yes.
Q. And she asked, you know, should this process be starting now, or is it preferrable to wait until Grape, which is Guidant, has a signed deal with Boston before providing such potentially sensitive information to potential acquirers; do you see that?

A. Yes, I do.

Q. So in her mind, at least, it's an open question as to whether it's obvious that such information should be given to third-party divestiture candidates prior to the signing of the Boston Scientific deal, right? She's asking for guidance?

A. Well, let's ask the reason why the question is being asked.

THE COURT: Well, just, if you can answer the question. She's asking for guidance, as far as you know?

THE WITNESS: She's asking for guidance, but not because she's concerned, necessarily, with compliance with the merger agreement. The thrust of the e-mail seems to be she's concerned with competitively sensitive information.

THE COURT: All right. We'll come back to that. Maybe Mr. Boies will ask you that. Go ahead, next question.

BY MR. COFFEY:

Q. And then Mr. Stoll responds, right? He says, Bean can start negotiating such agreements. However, due diligence will not begin until there's a definitive stock purchase agreement between Boston and Guidant. Do you see that?

A. I do.

Q. All right. So it's far from obvious that Guidant would be providing diligence to third-party divestiture candidates prior to the January 9th firm offer from Boston; isn't that right?

A. No, I don't agree with that.

Q. Now, would you disagree with Mr. Stoll, who's testified in

this case, or his deposition is in this case, that more often than not that's how it's done, that you wait for the definitive agreement before you provide diligence to third-party divestiture candidates?
A. Well, I'm not familiar with Mr. Stoll's testimony, and I'm not familiar with the context within which he made that statement, if he did, or for what reasons he made it.
Q. Now, there came a time when Guidant provided confidentiality information about itself to Abbott; isn't that right?
A. As I indicated earlier, I don't know whether the information was given to Boston Scientific and then given to Abbott, or whether it was given to Abbott directly. It was provided. My understanding is Guidant information was given to Abbott.
Q. Okay. Now, there were, as we've discussed, two additions to the definition of representative, one for financing sources and one for divestiture parties. The one that was the basis for the advise you claim you gave Mr. Kury was that was Abbott's role as a potential financing source; do I have that right?
A. That was one of the bases, not the only basis.
Q. Now, prior to Abbott being given due diligence -- I want to isolate the time. Prior to Abbott being given due diligence, is it not correct that your advice to Mr. Kury that you claim

you gave him was based on Abbott's role as a potential financing source?
A. I answered previously that was one of the bases. Another basis was that Abbott was a representative of Boston Scientific.
THE COURT: When did you articulate that to Mr. Kury?
THE WITNESS: In one or more conversations in the December time frame, with the ongoing dialogue of information being provided to Boston Scientific. Boston Scientific, my understanding was, was having discussions with Abbott, and then at some point, asked us to provide or to get information that it could provide to Abbott in and around December 20th, thereabouts.
THE COURT: Why did any of this matter if what you told me before was the proper interpretation of this thing? Why did it matter if they were a financing source or a representative or something else, if all that mattered was that they be crucial for the deal?
THE WITNESS: Well, your Honor, if they are, as I believe they are and were, the financing source and a representative, you don't have to get to the other question of how to interpret the confidentiality agreement. You just get to the question of, is giving them information consistent with 4.02(A) of the merger agreement.
So there are two independent bases on which Abbott

could have information about Guidant, one is the discussion we've had about what the confidentiality agreement does and doesn't provide. Separate and distinct from that is whether or not Guidant can give information to Abbott under the terms of the merger agreement with Johnson & Johnson.

THE COURT: And when did you first articulate to Mr. Kury, or anybody associated with Guidant, the former?

THE WITNESS: Right now, I don't recall discussions with -- specific discussions with Bernard Kury about it, but that is just what the merger -- that is just what the confidentiality agreement provides.

THE COURT: Well, when do you first recall articulating that to anybody?

THE WITNESS: Well, it's difficult for me to answer. I recall being very aware of it at the time, and I recall having discussions with Brian Duwe and Bernie Kury over the period of time about what was being done with Boston Scientific's proposal, and then the request for information to be given to Abbott.

THE COURT: So do you think that you articulated this to one or more of those individuals before the end of January 2006?

THE WITNESS: I don't know, your Honor, whether it was an express topic of conversation. Far more the focus of the conversation and the discussion was that the provision of information to Abbott was permitted by the language of the merger agreement itself. So there was far more focus and discussion about the provisions of the merger agreement than the confidentiality agreement.

THE COURT: Okay. Next question.

BY MR. COFFEY:

Q. I want to go back and follow up on something you said earlier about how the circumstances that came to pass when Boston came on the scene were, I think you said, clearly foreseeable.

I take it your view is it would have been logical for Johnson & Johnson to expect, and you just said this, that the companies most likely bidding against it for Guidant would probably have antitrust issues of their own?

A. Yes.

Q. And much like Johnson & Johnson itself had antitrust issues back in 2004?

A. Yes.

Q. And why don't we call up Mulaney Exhibit 1. There came a time, Mr. Mulaney, after Johnson & Johnson had reached out to Guidant to discuss a possible business arrangement, where you sent a memo to Mr. Kury with some advice regarding how Mr. Kury should handle that approach, right?

A. I think we provided a lot of advice and information about matters to be thought about as this process continues, yes.

Q. Right. And Mulaney 1 is a July 2nd, 2000, memo -- 2004 memo from you to Mr. Kury that provided some written advice about how you should deal with Johnson & Johnson, right?
A. What accompanied this is a draft outline indicating various legal considerations and entering into a dialogue with Johnson & Johnson.
Q. Had Mr. Kury asked for this advice?
A. I don't recall whether he asked for it, or whether I suggested we could give it to him, or who asked whom for what.
Q. But the advice was put in writing, right?
THE COURT: Well, just answer. The advice was put in writing, right?
THE WITNESS: Yes.
Q. Now, on the second page of the exhibit, Bates No. 9076, it's the first page of the attachment, if you go down to the fifth bullet, the one that says: Attempt to steer Juice -- "Juice" being Johnson & Johnson, right?
A. That's correct.
Q. And the second sub-bullet under that begins: May enable Guidant to force Johnson & Johnson to assume greater antitrust risk and thereby obtain greater certainty of closing. Right? So clearly, antitrust risk in any potential deal with Johnson & Johnson was a topic on which you were focusing, right?
A. Correct.
Q. And you were advising Mr. Kury on ways that he could get

Johnson & Johnson to keep more of that risk, right?
A. Yes.
Q. And Johnson & Johnson chose to proceed with the deal and assume much of that risk, correct?
A. Yes, they did.
Q. Now, in doing so, Johnson & Johnson chose not to reserve for itself the right to provide that Guidant information could be given to potential divestiture partners before its merger agreement was signed, right?
A. It didn't reserve for itself. It never had the right to do it, and they were not given that right.
Q. And a second bidder could come along and it decided to do likewise?
A. I'm sorry, a second bidder could come along?
Q. And decide to do the same thing, assume the antitrust risk?
A. It could assume it. It has to convince Guidant to accept the offer, however.
Q. And second bidder could have come along and made a joint -- a second bidder or group of bidders could have come and made a joint takeover proposal that included a divestiture party, right? That could have happened?
A. That could have happened.
Q. Or a rival bidder that was not willing to take that risk could decide that it would only make a firm bid if it could line up a divestiture party in advance of making a firm offer;

that was a potential scenario, right?
A. Yes.
Q. And that last scenario was foreseeable at the time that the J&J confi was signed, right?
A. Yes.
Q. Clearly foreseeable, right?
A. Yes.
Q. And the J&J confi could have provided that potential divestiture parties could be among the parties who would be given Guidant information, right?
A. The J&J confi agreement is --
Q. Assuming Guidant would go along with it?
A. J&J confi agreement is not the relevant document as to what Guidant can do when it's approached by an intervenor for a takeover proposal, having signed an agreement with Johnson & Johnson. The operative document is not the confidentiality agreement. It's the merger agreement.
THE COURT: You just said it isn't even that, right? Earlier today, I mean, that's what you've been saying. You're saying neither the merger agreement nor the confidentiality agreement limited the ability for Guidant to get information to a divestiture party, right?
THE WITNESS: That's correct.
THE COURT: Once there was a bid that was likely to lead to a superior takeover bid?

THE WITNESS: That's correct.

THE COURT: Okay.

BY MR. COFFEY:

Q. Well, the J&J -- the merger agreement makes the J&J confi relevant, right, Mr. Mulaney, by its terms?

A. Only as to the confidentiality provisions, not as to the class of parties that can receive information.

Q. Right. Because your testimony is that representatives is not a confidentiality provision, correct?

A. Well, even more so, my testimony is that the merger agreement has some definition of representatives which is different than the definition of representatives in the J&J confi.

Q. Well, my question was different. You said only as the confidentiality provisions, not as to the class of parties that can receive information, and I'm following up on that answer by saying that's because your testimony is that representatives is not among the confidentiality provisions, right?

A. That's correct.

Q. Now, the fact that a rival bidder that was not willing to take the risk and would insist on lining up a divestiture party and having diligence provided to that divestiture party before making a firm offer, that was foreseeable before making the initial merger agreement between Guidant and Johnson & Johnson was signed in December of 2004, right? That was foreseeable?

A. Yes, it was.
Q. It was clearly foreseeable, wasn't it?
A. Yes.
Q. And that initial merger agreement could have provided that Guidant would be able to provide potential divestiture parties with information should a rival bidder come along and ask for it to do so; it could have said that, right?
A. It did.
Q. In your view, it did?
A. Yes. It does.
Q. And do the words in 4.02, potential divestiture parties, even appear?
A. Those words do not appear. The defined terms representatives does appear.
Q. And your answer is because representatives in the merger agreement helps define who is permitted to get information, right?
A. That's correct.
Q. So the language in 4.02(A)(x) that says that the company may give information, "to the person making the takeover representatives and its representatives" is a limit on who gets information, right?
A. It specifies what provisions of information are permitted by the merger agreement, yes.
Q. Well, I'm not talking about the provisions of information.

I'm talking about who gets it, and my question is, based on what you just said, do you now agree that the provision in 4.02(A)(x), which says the company may give information to the person making the takeover proposal and its representatives, acts to circumscribe who can get Guidant information?

A. It doesn't create a barrier from information being provided to a takeover proposal candidate -- maker, I'm sorry, giving that information to a third party for reasons we've previously discussed.

It says what Guidant may do, and then once that information is provided to the maker of the takeover proposal, as we've discussed, that maker of the takeover proposal has rights to share that information, subject to confidentiality provisions and obtaining assurances. It's only used for purposes of the transaction, et cetera.

So your reading of restrictions into this language, that, I'm disagreeing with.

Q. Okay. Assume for me for the moment that there's no confidentiality agreement here and this sentence under 4.02(x) ends after, close parens, representatives, period. So that Guidant can furnish information to the person and its representatives. Period. It doesn't have to be pursuant to a confi.

You would agree with me that that limits the people who can get information from Guidant to the person making the

takeover proposal and its representatives, right? Those are the only people who can get it?
A. Yes, I think if you stop the sentence that way, you could read it that way, yes.
Q. Okay. And so do I get this right because the words, the sentence continues and says, pursuant to a confidentiality provision, provisions of a confidentiality agreement, that circle can be expanded?
The fact that the words continue to then say, but it's got to be pursuant to a confidentiality agreement, your testimony is that that opens the door to people other than the person making the takeover proposal and its representatives?
A. It means that information, once furnished to the maker of the takeover proposal, could give that information to another party.
But let me be very clear, if you want to put a period after the word "representatives," and then say are we comfortable with that language, giving information to Abbott as a party that is a representative of Boston Scientific, the answer is yes. We don't need the additional language to be able to say to you the merger agreement, by its terms, permitted us to do what we did.
Q. Because your view is that the Johnson & Johnson merger agreement permitted Guidant to give information to potential divestiture parties, that that was part of the bargain that

Guidant struck with Johnson & Johnson; that's your testimony?
A. My testimony is the merger agreement provides that we can, if we satisfy the other conditions, give information to the maker of the takeover proposal and its representatives, and that properly understood Abbott as a representative of Boston Scientific in the specific circumstances in December of 2005.
Q. Now, the Court posed some questions about what Mr. Duwe and Shearman Sterling were doing in light of your testimony about the impact of the word representative, and I think you said in response to my question that sometimes in corporate deals it's better to be safe than sorry; do you remember that answer?
A. I think that was your question.
Q. Right, and you adopted it. I said: Better safe than sorry, and you said yes?
A. No, I said generally.
Q. Generally. Okay. Wouldn't it have been safer to include in the Johnson & Johnson merger agreement language that said, oh, by the way, given the different circumstances, if a rival bidder comes along and needs us to give diligence to a divestiture party so it can line up its antitrust solution before it makes a firm offer, so we're going to add that language, wouldn't that have been safer? Wouldn't that have been doable?
A. It's doable.
Q. But you didn't do it, right?

A. We didn't do it. We got the same result. We didn't do it.
Q. Now, in your trial affidavit you also asserted it was foreseeable that a potential rival bidder for Guidant might need to rely on financing; do you remember that?
A. Yes.
Q. And that those financing sources might require access to Guidant information do you see that -- do you remember that?
A. Yes.
Q. By the way, you've counseled hostile bidders in your career, right?
A. Yes.
Q. And in those instances, the lenders don't typically get access to confidential information, right? They have to rely on public sources because it's hostile?
A. That's correct. That's one problem with the hostile bid.
Q. But the point being, there are instances where lenders do not get confidential information, right?
A. Yes, and sometimes they lend less because they didn't.
Q. Now, in any event, let's talk about the friendly scenario where a rival bidder might ask the target for confidential information. That scenario was foreseeable at the time the J&J confi was signed in August of 2004, right?
A. Yes.
Q. It was also foreseeable when the initial merger agreement was signed in December 2004, right?

A. Yes.
Q. And both the confi and the initial merger agreement could have included language that provided that potential financing sources get Guidant information, right?
A. Could have included express language, but the language that was used, so provided.
Q. But the words aren't there, right?
A. The specific words are not. The intent and the result is.
Q. I'm going to ask you about intent. If you'll turn to Mulaney trial affidavit paragraph 7?
THE COURT: Mulaney trial?
MR. COFFEY: It's PX167, your Honor. It's his trial affidavit. Go to Paragraph 7.
THE COURT: In the binder?
MR. COFFEY: We looked at this paragraph before. This does not have that sentence about Johnson --
THE COURT: Is it in the binder or no?
MR. COFFEY: It's his trial affidavit. I believe counsel handed it up. I'm sorry.
THE COURT: Okay. I got it. Mr. Mulaney.
BY MR. COFFEY:
Q. Now, turning to the third sentence, you state that you do not recall discussions or negotiations between the parties with respect to the definition of representative in the J&J confi; do you see that?

A. Yes, I do.
Q. Right. Then in the next sentence you refer to your expectation, intention, understanding regarding the impact of the definition of reps on proposals from a third party; do you see that?
A. Yes, I do.
Q. Namely, that it was never your expectation, intention or understanding that the definition would operate to limit or impede the type or nature of the rival bid; do you see that?
A. Yes, I do.
Q. But for this very same paragraph, you have no recollection of communicating to J&J anything regarding this expectation, intention or understanding, correct?
A. No, it is not correct.
Q. The prior sentence says you don't recall any discussions or negotiations with respect to the definition of representatives. You stand by that testimony, right?
A. Yes, I do.
Q. And how is that consistent with you communicating to J&J the sentiment that's in the following sentence, which, by the way, is rooted to the definition of representatives? How do you square those two, sir?
A. In the negotiation of the merger agreement, Mr. Townsend of Kravath, representing Johnson & Johnson, and I discussed the flexibility and freedom of action Guidant wanted, once it

signed the merger agreement with Johnson & Johnson.

The initial draft provided by Johnson & Johnson did not give Guidant the ability to terminate a Johnson & Johnson merger agreement to accept a higher offer. We said to them, the basis upon which we are discussing a transaction with you on an exclusive basis, Johnson & Johnson, is that once we sign an agreement, we get a robust, full-throated, uninhibited, passive market check.

We're not going to solicit, but we want to be able to respond to any higher bid that might be out there, and if there is, you will have the last look. We will keep the information that we give to the intervenor confidential, but we want to be able to respond to a higher bid, if it's out there. That's the bargain that we made, that's why you're dealing with us exclusively.

Q. But as we discussed early in our back and forth today, that right came with limits, right? It wasn't --

A. It came with limits. Your question was why was I confident I expressed that intention to Johnson & Johnson. I gave you the answer to that question.

Q. And but at the end of these discussions, the bargain struck between Guidant and J&J was Guidant agreed not to solicit, encourage, facilitate or otherwise in any other way cooperate, but if there was this triggering event, the superior proposal had been found, Guidant could do two discrete things. That was

the bargain that emerged at the end of these discussions with Mr. Townsend, isn't it?
A. 4.02(A) was the result of our negotiations, yes.
Q. And Guidant could be robust and full-throated with regard to the two precise exceptions to the no solicit, no facilitation clause that it had negotiated for, right?
A. It could do what the merger agreement did not prohibit.
Q. Which is anything other than 4.02(A)(x) and (y), right? Anything else is prohibited, other than the two exceptions that were identified in the Skadden memo, right?
A. What's prohibited is the first part of 4.02(A), unless you're permitted under the second part of 4.02(A).
Q. Well, 4.02(A) says you can't facilitate, right?
A. Yes.
Q. Can't facilitate or take any actions that could reasonably expect to facilitate a takeover proposal, right?
A. I don't have the language in front of me. If you're reading it from the agreement, I'll accept the reading.
Q. Okay. When the triggering event occurred, the exceptions to the prohibition that Guidant was then allowed to pursue, giving information, very brief summary of that, and negotiated, discussed, did not release Guidant from its obligation not to take any action that could reasonably expect facilitating that takeover proposal, right?
A. Wrong.

Q. Your view is that Guidant was then free to facilitate?
A. If Guidant is giving information, providing, negotiating and entering into discussions with a third party about a takeover proposal, it is facilitating, it is cooperating, and it is encouraging a takeover proposal. That is exactly what it bargained for, and that's what negotiated, discussing and providing information is all about.
Q. All right. But it doesn't say that you can give, facilitate that -- let's take your point. Talking, encouraging is provided under the second provision, and giving information under the first exception, but what's not permitted is to facilitate the offerer's resolution of his antitrust problem, right?
A. Wrong.
Q. Your view is that Guidant was then empowered, under the two exceptions, somewhere in there to take steps to enable Boston Scientific to overcome its antitrust concerns?
A. What I'm saying is Guidant clearly could enter into discussions with Boston Scientific, but what were the antitrust issues Boston Scientific faced and how did Boston Scientific try to address them, would that be satisfactory to the Federal Trade Commission? And if we were not confident that they had addressed all the potential problems the Federal Trade Commission could raise, we could identify those problems and ask them, how do you propose to address this problem and that

problem?

So we would enter into a discussion with them about regulatory problems because the merger agreement that had been negotiated required, as a predicate for terminating the Johnson & Johnson agreement, that we found that the Boston Scientific offer was reasonably likely to close taking into account regulatory issues.

Q. So let me follow up. So these discussions are held and Guidant says, how are you going to deal with this? And Boston comes back and says, the way we want to deal with it is to line up a third party to agree to buy these assets before we make you a firm offer.

Is it your testimony that once Boston comes back and says that, Guidant was authorized, under the merger agreement, to help Boston solve that problem by giving information to that potential divestiture party? Is that your view of the merger agreement?

A. You've now conflated two matters. One, you asked me, once we talked and give information, a takeover proposal can be facilitated. I said, yes, and I gave you a hypothetical example of how it could be facilitated and antitrust discussion.

Now, you're too fast. The facts are that Boston Scientific came to us with a previously identified desire to divest our business, both to help finance the transaction and to solve an antitrust problem. They were the architects of the approach. They were the architects of how they were going to get antitrust approval.

We asked them questions about it, and entered into a dialogue with them. They were the architects of how they were going to get the antitrust approval and convince us that their transaction was going to close.

Q. I got that. And that's pursuant to these discussions, which, for purposes of the question here, we'll stipulate was provided --

A. No, it was pursuant to their pre-ordained strategy before we even started discussing the --

Q. My focus was on what Guidant could do, not Boston Scientific.

A. Okay.

Q. As a result of these discussions, you learned that Boston was going to go forward, but it wanted to have a divestiture party lined up before it could make a firm offer, correct?

A. Yes, in the course of the discussions, yes.

Q. So that's part of the discussions, you learned something. My question is, was Guidant then empowered, under the merger agreement, to take affirmative steps to facilitate solving that problem, helping Boston Scientific with that plan?

A. In the course of dialogue about getting regulatory approval, could part of that dialogue be, have you thought

about X or have you thought about telling the EUY? Yes, you could have had dialogue like that because you can discuss it.
Q. I got the dialogue piece.
A. And the dialogue can be facilitative, and it can be cooperative.
Q. This is beyond words. This is beyond talking. I'm now talking about action.
Is it your view that the merger agreement provided -- permitted Guidant to go beyond words and to help Boston Scientific solve its antitrust issue by providing diligence to third-party divestiture parties while the Johnson & Johnson merger agreement was still in force?
A. Clearly, that was the advice we gave. Absolutely, yes.
THE COURT: So do you think you could have found them a third-party divestiture partner? You could have said, or Guidant could have said to Boston Scientific, you know, you've got this problem. We know who you could use, and you could identify and, in fact, introduce the third-party divestiture candidate?
THE WITNESS: I'm not saying that, your Honor.
THE COURT: Okay. Why not? I thought you were saying all bets are off once they made a takeover bid or a --
THE WITNESS: No.
THE COURT: -- bid that's likely to lead to a superior bid?

THE WITNESS: I'm not saying that, your Honor, because I don't need to say that because we didn't say that. In fact, we didn't need to. They identified Abbott. Abbott was already at the party. Indeed, Johnson & Johnson brought Abbott to the party months ago.

THE COURT: Okay.

BY MR. COFFEY:

Q. Now, there came a time when you learned that there was a Boston Scientific/Abbott transaction agreement in or about a January '06, correct?

A. That is correct.

Q. Now, you weren't privy to the negotiations between Abbott and Boston Scientific prior to their deal being disclosed to you, were you?

A. I wasn't personally, no.

Q. Okay. Is the word "personally" in there for a reason? Was there some other way you were -- Were you aware of what they were talking about?

A. I was aware they were talking and negotiating, yes.

Q. Were you privy to the terms that they were discussing prior to them being publicly announced?

A. No.

(Continued on next page)

Q. Now, the Boston Scientific/Abbott transaction agreement that eventually came to light provided Abbott would do several things. It would pay some cash, correct?
A. For the VI and ES business of Guidant? Yes.
Q. It was going to provide a loan to Boston Scientific, right?
A. Yes.
Q. And it was going to make an equity investment in Boston Scientific, correct?
A. In the later iteration of the Boston Scientific proposal, yes; not initially.
Q. But at the time Guidant began to provide diligence to Abbott on or about December 22, you were not aware of Abbott's potential equity investment in Boston, right?
A. I don't believe I was.
Q. Same question with regard to the loan that Abbott was to make: You were not aware of that either when Abbott was first provided diligence, right?
A. I don't recall.
Q. Now, as I understand it, in conveying your advice to Mr. Kury prior to December 22 with regard to the rationale that Abbott was a financing source, you were focused on the fact that Abbott might pay Boston a sum of money in return for buying certain assets that Boston would have acquired from Guidant. Is that right?
A. Excuse me. You mischaracterized my testimony. I said, in

addition that one of the rationales to give information to Abbott was their financing source. I said secondly, they are a representative of Boston Scientific.
Q. There came a point before December 22 when you told Mr. Kury Abbott can get diligence because they are a representative. You used words to that effect with Mr. Kury?
A. Yes, I said they're covered in the notion of representatives.
Q. Now, can you point to any writing, any email, any time sheet, any documentation that shows that you said that to Mr. Kury prior to December 22?
A. Not that I know of. Excuse me. Let me elaborate on that answer. In the sense that we gave Mr. Kury a draft Boston Scientific confidentiality agreement and that said if approved by Guidant, information could be given to a divestiture candidate, and inasmuch as we then followed up with a letter to Mr. Kury in which he said to Johnson & Johnson that Guidant had entered into a confidentiality agreement with Boston Scientific consistent with the terms of the merger agreement, those writings evidenced that advice had been given to Guidant that the Boston Scientific confidentiality agreement was consistent with the merger agreement, and so I think it's a clear writing of our communication to Guidant of the advice I gave to Bernard Kury orally in the course of one -- more than one conversation in December of 2005.

THE COURT: What do you remember of these oral conversations? Were they in phone or in person?

THE WITNESS: They would be on the phone. Guidant was headquartered in Annapolis at the time.

THE COURT: What do you remember about the phone calls in which you advised him that Abbott was Boston Scientific's representative?

THE WITNESS: I said within the construct of 4.02(a), Abbott is fairly characterized as a representative of Boston Scientific. It's someone working with Boston Scientific in connection with its takeover proposal.

THE COURT: You remember saying that to Mr. Kury?

THE WITNESS: I don't remember those exact words, your Honor. I remember discussion of why Abbott can get information and it's because it is within the definition of a representative of Boston Scientific under the merger agreement. Yes, so telling him that Abbott was within the definition of a representative of the agreement, I'm sure that I said that to him.

THE COURT: Was he concerned that they weren't?

THE WITNESS: No, he wasn't, your Honor.

THE COURT: What raised this topic, if you remember?

THE WITNESS: I think there was some dialogue that Abbott -- I'm sorry -- Boston Scientific wanted information to be given to Abbott sooner or faster, some measure of impatience. They were anxious to proceed with completing Abbott's due diligence, and I think the dialogue occurred in that connection as well as just the ongoing dialogue of what's happening and when it's happening.

THE COURT: This was what day, approximately, do you know?

THE WITNESS: I don't recall, your Honor. Some day in December.

THE COURT: Who was else was on the call?

THE WITNESS: It would be just Bernard Kury and myself.

THE COURT: It would be or you have a recollection of it being just the two of you?

THE WITNESS: I have a recollection of many conversations just the two of us, yes.

THE COURT: Do you have a recollection of this conversation in which you told him in substance that Abbott was a representative under the agreement?

THE WITNESS: Yes, your Honor.

THE COURT: So you do recall telling him that in substance, and that was just to you on the phone?

THE WITNESS: Yes, your Honor.

THE COURT: Do you remember what day it was?

THE WITNESS: No, your Honor.

THE COURT: Do you keep track of that kind of thing, time sheets or phone logs?

THE WITNESS: Generally not, your Honor. This is the tenth, eleventh month in the course of a very intense deal, and my general practice would not be to try to do a time sheet that itemized the topics discussed during the course of the day. There are a large number of topics discussed during the course of a day at this time.

THE COURT: Did you discuss with anybody else at Skadden prior to conveying this information to Mr. Kury, this advice that you were going to give him, give Mr. Kury?

THE WITNESS: Yes, I discussed with Brian Duwe the appropriateness of the Boston Scientific confidentiality agreement which provided or contemplated providing information to divestiture candidates.

THE COURT: Do you remember having that conversation with Mr. Duwe?

THE WITNESS: Yes, I do, your Honor.

THE COURT: How far in advance of the conversation you just described with Mr. Kury?

THE WITNESS: The conversation with Mr. Duwe would be around the time of negotiating the Boston Scientific confidentiality agreement, so I guess that's December 7, 8, 9, that time frame. December, 7, 8. And then prior to Abbott getting information, later December, December 22, etc. I had various conversations with Mr. Kury about due diligence being provided to Boston Scientific, I think to its financing sources and then the mechanics of it being provided to Abbott and the provision of due diligence materials to Abbott and to Boston Scientific and a heavy overlay of antitrust concerns and issues because the antitrust lawyers were policing what information went to whom, because there are antitrust rules against gun jumping --

THE COURT: My question was just how far in advance of the conversation you just described with Mr. Kury. So, when you had this conversation or conversations with Mr. Duwe, was it more than one conversation with him about representatives including Abbott?

THE WITNESS: Mr. Duwe, your Honor?

THE COURT: Mr. Duwe, you had more than one or just one?

THE WITNESS: I think it was more than one during the course of a day, etc., and we talked about Mr. Duwe's conversation with Shearman & Sterling. And I said, I take it Shearman & Sterling is comfortable with our reading of representatives in the agreement, the document being public and Shearman & Sterling, I assumed, did not want to do anything that would violate the agreement because they wanted to formulate a viable bid that wasn't subject to a legal challenge.

THE COURT: You recall discussing this with Mr. Duwe?

THE WITNESS: Yes, I do your, Honor.
THE COURT: Mr. Coffey, you may continue.
MR. COFFEY: Thank you, Judge.
BY MR. COFFEY:
Q. Mr. Mulaney, with regard to Mr. Duwe, would you from time to time communicate with him by telephone?
A. Yes.
Q. Would you from time to time communicate with him by email?
A. Yes.
Q. Were there instances in which the email was simply between the two of you; either you sent it to him or he sent it to you?
A. I assume that occurred, yes.
Q. Did you have any email communication with Mr. Duwe in which you either mentioned that you were going to have a call with Mr. Kury about this topic or did have a call with Mr. Kury about this topic?
A. I don't recall.
Q. We'd have to look at the emails to see if such things occurred?
A. I would have to, yes.
Q. In rendering this advice you say you gave to Mr. Kury, you did no legal research on it, that's right?
A. I don't recall legal research being done on the topic, yes.
Q. Mr. Mulaney, you're aware, aren't you, that Boston Scientific and Guidant entered into an oral joint defense

agreement on or about December 9, 2005?
A. That sounds familiar, yes. I believe that occurred.
Q. Is it correct that you have no recollection of any discussion with Guidant as to whether that was permissible under the J&J merger agreement, right?
A. I don't recall express discussion with Guidant about it. It clearly was permissible under the merger agreement.
Q. I ask you to turn to your -- well, you say you don't recall an express discussion. Do you recall any discussion whatsoever on that topic with Guidant?
A. Well, I don't recall a discussion specifically, but I recall many discussions about the mechanics that were being put in place for information to flow from Guidant to Boston Scientific and then to Abbott. And part and parcel of that discussion very likely could have included the joint defense agreement as well as the various protocols the antitrust lawyers put in, but you're asking me do I expressly recall a specific discussion in which we talked about the joint defense agreement, you know, as of right now I don't expressly recall it. Very likely, but I don't expressly recall one.
Q. If you would, sir, in your binder, you should have a copy of your deposition. I'm going to ask you to turn to page 159 and we will call it up on the screen as well. The screen will have it if you don't want to dig through it.
THE COURT: Last tab in the binder. But it's small

print.
Q. I'm going to direct your attention to 159/lines 15 through 160/line 4. I am going to read this and follow along with me, please. The question was:
"Q. Did you ever have a discussion with Mr. Kury as to whether Guidant was permitted to sign an accession agreement or agreed to an oral defense agreement with Abbott prior to termination of the J&J Guidant merger agreement?"
There is an objection.
Then your answer is:
"A. I don't recall a discussion with Mr. Kury about a joint defense agreement." Then you go on to say, "I think my previous testimony about what I discussed with Mr. Kury about information being provided to Abbott is the answer to your question did I ever discuss with Mr. Kury Guidant signing an addendum or accession agreement."
Did I read that correctly?
THE COURT: I believe you did.
Q. Now, wasn't entering into -- withdrawn. You know at one point Abbott joined the oral joint defense arrangement, right. The oral joint defense agreement, excuse me.
THE COURT: Did you know that?
THE WITNESS: I believe I did, your Honor.
THE COURT: OK.
Q. Now, wasn't Guidant entering into an oral joint defense

agreement with Boston and then later Abbott otherwise cooperating in any way with a rival bidder in violation of Section 4.02(a)?
A. No. If I may, a joint defense agreement partakes of the nature of a confidentiality agreement. It surrounds information being shared between two parties, and the intent of the joint defense agreement is to limit a third party's ability to get at the information and the discussions taking place. So a joint defense agreement is in the nature of a confidentiality agreement.
Q. You would agree with me that it is a different type of confidentiality agreement than the one provided for by 4.02(a), right?
A. It's different. I don't think it's inconsistent with confidentiality.
Q. Well, my question is --
A. It promotes confidentiality.
Q. OK. I take your point, but you would agree with me that it is -- a joint defense agreement with Boston -- let me back up.
There was a BSC confidentiality agreement, right? There was a Boston Scientific confidentiality agreement that existed, right?
A. Yes.
Q. I'm talking about a separate agreement, an oral joint defense agreement among Guidant Boston and Abbott. You with

me?
A. Yes, I am.
Q. Right. That is different than the confidentiality agreement contemplated by 4.02(a), isn't it?
A. It's different, but it is consistent with and is promoted off the confidential treatment of information that a confidentiality agreement is trying to achieve.
Q. Different but consistent, that's your testimony?
A. Distinct. It's consistent. It's trying to keep information confidential.
Q. For the purpose of facilitating Boston's approach to the Federal Trade Commission, right, that's why that's entered into?
A. Well, and from third parties.
Q. But among the reasons was to aid Boston Scientific in its approach to the Federal Trade Commission to see if it could smooth the way for regulatory approval. Isn't that right?
A. Yes, similar to the joint defense agreement Guidant had with Johnson & Johnson.
Q. Mr. Mulaney, under Section 4.02(b) wasn't Guidant forbidden from entering into any agreement except the confidentiality agreement described in 4.02(a)?
A. Can you refresh my recollection as to what tab?
Q. Sure. Let's call up Kury Exhibit No. 9 beginning on page 6227 and it continues over on to the next page 6228.

A. And you're suggesting what provision was violated?
Q. All right. So it begins with -- it stated the company can't do certain things, and then one of them under (ii) that what the company can't do is adopt or recommend or publicly propose to adopt or recommend or allow the company or any of its subsidiaries to execute or enter into any letter of intent, memorandum of understanding, agreement in principle, merger agreement, acquisition agreement, option agreement, joint venture agreement, partnership agreement or similar contract constituting or related to or that is intended to or could reasonably be expected to lead to any takeover proposal (Other than a confidentiality agreement to in Section 4.02(a)). And then it's a defined term (an acquisition agreement).
That's what I'm directing your attention to?
A. OK.
Q. So an oral joint defense agreement is prohibited by 4.02(a), isn't it?
A. By 4.02(b)?
Q. By 4.02(b), yes, sir.
A. No, it isn't.
Q. And why isn't it?
A. Because an oral joint defense agreement doesn't partake the nature of a transaction agreement of the litany we just read -- letter of intent it doesn't partake of the nature of transaction agreement of the litany of agreements recited in

that sentence of 4.02(b) we are looking at.
Q. Well, the joint defense agreement was related to the take over proposal, right?
A. The litany of agreements in 4.02(b) that are not to be entered into are transaction agreements.
Q. I'm referring to the clause that says at the top of the second page "or similar contract constituting or related to or that is intended to or reasonably could be expected to lead to any takeover proposal."
Didn't the joint defense agreement relate to the takeover proposal?
A. It was parallel to the takeover -- the takeover proposal had already been made and the joint defense agreement, as I said, is in the nature of a confidentiality agreement with respect to the information being provided.
I do not believe another species of a confidentiality agreement is a violation of this clause, and I do not believe a joint defense agreement partakes of the nature of the agreement sought to be prohibited by this sentence.
Q. The defined term is acquisition agreement, right? Do you see that in the last paragraph?
A. Yes, I do.
Q. That's a defined term, but it is not strictly limited to acquisition agreements, right? And we know that, right, because there is actually a parenthetical that carves out of

this definition other than a confidentiality agreement referred to in Section 4.02(a). So the type of agreements contemplated by 4.02(a) include things that aren't strictly acquisitional in nature, right? 4.02(b), I'm so sorry.
A. I believe the intent and purpose of the sentence in 4.02(b) is relating to transactional type of agreements, and I do not believe a version of a confidentiality agreement violates it.
Q. But you don't recall any discussion with anyone at Guidant about this provision, right?
A. No.
Q. Are you aware that Guidant provided confidential information to the Federal Trade Commission on a voluntary basis in connection with the Boston proposal prior to the termination of the J&J merger agreement?
A. I'm not specifically aware of it, but it wouldn't have violated the merger agreement if it did, and I similarly understood and assumed that Johnson & Johnson provided Guidant information to the Federal Trade Commission in the course of attempting to get antitrust approval.
Q. Again, that was after J&J had a signed merger agreement, right?
A. But subject to a confidentiality agreement equally binding after signing the agreement as we previously discussed.
Q. Is it correct that you recall no discussion with Guidant as to whether Guidant provided confidential information to the FTC

in connection with Boston proposal was permitted under the J&J merger agreement?
A. I don't recall a discussion with Guidant about it, but it was permitted.
Q. Well, my question is, did you have any discussion with anyone at Guidant about whether it was permitted?
A. Not that I recall.
Q. In the course of Skadden's representation of Guidant from Johnson & Johnson's first approach in the summer of 2004 through the closing of the Boston Guidant deal in 2006, there were many occasions when Mr. Kury sought legal advice from Skadden. Is that right?
A. Yes.
Q. And Skadden would endeavor to respond to those requests, correct?
A. Yes.
Q. Now, you're aware that this lawsuit was filed in or about September 2006?
A. Yes.
Q. Sir, you're a corporate lawyer but you have some familiarity of litigation, right?
A. Yes, I do.
Q. Now, are you aware that as is typical in litigation, the parties here served document demands on each other and on third parties to gather documents pertaining to the claims and

defenses in this lawsuit?
A. I'm not aware of them. I assumed that happened.
Q. Did there come a time when you were asked to locate documents that were related to this lawsuit?
A. Yes.
Q. Now, a veteran corporate lawyer like you are, of course, familiar with the attorney-client privilege?
A. Yes.
Q. You understand that a party can withhold documents from production in a lawsuit on grounds that those documents reflect a request for or provision of attorney advice, right?
A. A party can seek to, yes.
Q. Now, sir, you're aware that Guidant as part of its defense in this case came to decide that it would waive in part the attorney-client privilege?
A. That's my understanding.
Q. And it did so in or about 2010?
A. I don't recall when.
Q. I will represent to you that it was June of 2010. Now, before Guidant waived its privilege, it produced a log of documents it was withholding from production to Johnson & Johnson on grounds of privilege. Do you know that?
A. No, I didn't know that.
Q. Do you have any idea how many documents Guidant had originally withheld from production on grounds of privilege?

A. No.

THE COURT: It's about 1:00. Do you want to finish up this line of questioning and then start another topic?

MR. COFFEY: It would take a while.

THE COURT: To finish this line?

MR. COFFEY: Yes.

THE COURT: Why don't we stop? Everybody can go outside and get warm. I am going to get those Bob Cratchit gloves.

I should instruct you, you probably already understand it, Mr. Mulaney, you are on cross. Don't discuss the substance of your testimony with anybody else. You can talk about lunch and things like that, but don't discuss the substance of your cross. We will circle back here at 2:00. See you then.

(Luncheon recess)

AFTERNOON SESSION

2:00 p.m.

THE COURT: Let's proceed.

MR. COFFEY: Thank you, your Honor.

CHARLES MULANEY

DIRECT EXAMINATION CONTINUED

BY MR. COFFEY

Q. I am going to hand you, Mr. Mulaney, two compendiums. Mr. Mulaney, I placed before you two documents PX-200-A and PX-200-B. I will represent to you these are printouts of privilege logs that were emailed from Guidant's counsel to Johnson & Johnson counsel in early 2009 about a year -- over a year before the waiver.

I want to note for the record that 200-A has the cover email, and I should note that the top part of that first page has been redacted because that is the internal Kramer Levin email "please print this." 200-A is for wholly privileged families of documents that were withheld at least at that point in time. And 200-B are for documents that were withheld or redacted in part to remove materials that Guidant's counsel believed reflected requests for and provision of legal advice.

So you have those two in front of you, don't you, Mr. Mulaney?

A. Yes, I do.

Q. If we were to flip through this, you will see it is not in chronological order the way it was sent to Johnson & Johnson. So I want to ask you some questions that pertain to the period between December 5, 2005 and January 8, 2006. Would it be helpful if I were to give you a document that dealt with only that time period and actually put the documents in chronological order?

A. I'm sorry, I don't know the purpose of the questioning, so I can't answer your question.

Q. Well, you will see if you flip through this, right, it's not in order, not in chronological order. But as you flip

through it, you will see occasionally references to memoranda being prepared by Skadden, draft presentations and the like. Do you see that?
A. Well, I don't because I haven't read it in detail, but if you represent, I'm prepared to accept that.
Q. I will also represent that there are between the two documents over 13,000 entries relating to documents that Guidant had at one point withheld on grounds it constituted requests for and provision of legal advice. So let me go ahead and give you a document PX-201. For the record, it is culled from the two documents that I have given you PX-200-A and B and it has extracted all the entries between December 5, 2005 and January 8, 2006, and it is further limited to eliminate any entries that didn't have Guidant and Skadden both as either authors or addressees because the focus of my questions are going to be on the interaction between Guidant and Skadden on matters that involved the provision of and receipt of legal advice.
Now, you see there are roughly a dozen or so entries on either page, give or take, 173 pages. I will represent to you that about 1,900 entries describing documents where there were communications involving Guidant and Skadden between December 5 and January 8 that Guidant had prior to the waiver withheld on grounds of privilege.
Now, I want to step you through parts of this. You

will turn to page 1. The first entry -- I will be referring to the entry by the number at the far left corner, and that corresponds to how Guidant identified the document. You will see that the description of this particular document 1155 is the redacted material that reflected requests for and provision of legal advice regarding an SEC filing. Do you see that?

A. Yes, I do.

Q. If you go a little further down the page, five or more down, entry 3586, this document redacted material reflecting a request for and provision of legal advice regarding the J&J merger agreement. Do you see that?

A. Yes, I do.

Q. If you skip down four more, entry 4352, redacted material reflected requests for and provision of legal advice regarding a press release regarding the J&J merger. Do you see that?

A. Yes.

Q. If you will flip to page 4 of the document, the last entry on page 4 number 4622, do you see that in this instance the email chain had attached a draft memorandum with regard to the legal advice regarding an SEC filing. Do you see that?

A. Yes.

Q. And from time to time, Skadden did in fact provide memos, right, with legal advice?

A. Yes.

Q. Now, further up on that page, the third entry number 4335,

the entry reflects requests for and provision of legal advice regarding exchange of due diligence. Do you see that?
A. Yes.
Q. I want to get more specific and ask you about the entries regarding Guidant's request for legal advice on two topics. One is due diligence and the other is confidentiality agreements, and again only between 12/5 and 1/8.

What I would like to do next is give you a document that has that further limitation, PX-202.

I will represent to you that there are about 880 entries describing the documents that were originally withheld from Johnson & Johnson on grounds that they in whole or in part reflected a request for and provision of legal advice regarding either due diligence or confidentiality agreements.

Now, as has been discussed, Guidant eventually waived the privilege, and most, if not all, of the documents that are in PX-202 have been produced.

Mr. Mulaney, would it surprise you to know that among those documents, there is not a single memo or email or document of any kind that memorializes any advice given to Guidant by Skadden on whether providing information to Abbott was permissible under Section 4.02?
A. Would it surprise me?
Q. Yes.
A. No.

Q. Now, I would like to direct your attention to the entries that start on December 20. I am particularly interested in that because you testified earlier when the Judge was asking you about your call with Mr. Kury, that I believe you said you recall that that call occurred at a time when Boston was expressing impatience about Abbott getting diligence sooner or faster. Does that refresh your recollection about when you had this call with Mr. Kury?
A. I recall in that December time period there was expressions of impatience from Boston Scientific's part, and I recall a number of conversations with Mr. Kury. The relationship of the two I can't recall.
Q. OK. Well, Abbott -- excuse me -- Guidant learned that Abbott was the potential divestiture candidate on December 20, 2005, correct?
A. That sounds about right, yes.
Q. And Guidant began to provide diligence to Abbott on December 22, 2005, right?
A. Guidant provided information, as I said, I don't recall whether it was to Boston Scientific and Boston Scientific gave it to Abbott or whether Guidant provided it to Abbott directly.
Q. At some point in time Guidant was producing information to someone knowing it would end up with Abbott, right?
A. Yes.
Q. So if the conversation that you say you had with Mr. Kury

involved Abbott specifically, and it was before diligence was being given, that conversation would have occurred on either the 20th, the 21st or the 22nd of December, right?
A. I don't know why it is limited to those dates.
Q. Let's start with that. The discussion you say you had with Mr. Kury in which you mentioned that Abbott was a representative and gave him comfort that Guidant could provide information without violating the merger agreement, did that occur before Guidant gave information to Abbott?
A. Yes, but I also believe I testified my discussion with Mr. Kury was along the lines of why the provisions of the Boston Scientific confidentiality agreement contemplated the provision of information to a divestiture candidate was permitted under the merger agreement separate and apart from the identity of Abbott.
Q. To the extent that the conversations -- first of all, I am focusing now on a conversation which I believe you said -- I want to get this right: The Judge asked what brought this call about. I think you said something about Boston and Abbott. So is it fair to say the call you described for the Judge earlier was at a point when you knew Abbott was playing, right?
A. One of the calls during which I discussed with Mr. Kury why we were permitted to do what we did, it concerned Abbott, I believe, and I think there were others that concerned the general topic of divestiture candidates.

Q. If you will turn to page 40 in PX-202. If you look at the fifth entry down, it's the first entry that takes place on December 20, entry 1037. If you will put your finger there to hold the place and flip ahead to page 51, the last entry on December 22 is at the top of that page, entry 5439. I will represent to you that there are approximately 159 entries in those three days alone.

Would it surprise you that none of the documents in that time period that were produced reflect any advice to Mr. Kury or anyone at Guidant from anyone at Skadden on the appropriateness of providing diligence to Abbott under the merger agreement?

A. Would it surprise me?

Q. Yes, sir.

A. No.

Q. Now, the Court inquired whether you had discussed the subject matter of your conversation about Abbott and Boston with Mr. Kury, if you discussed that with Mr. Duwe, and you said you had and I asked whether you and Mr. Duwe communicated by email. Do you remember that line of questioning?

A. Yes, I do.

Q. If there were emails with you on one side and Mr. Duwe on the other side that dealt with the subject matter -- subject matters that we have been talking about today, those might be helpful in shedding light on the advice you gave to Mr. Kury,

right?
A. It might confirm what I testified to.
Q. Or they might contradict what you've testified to, right?
A. I don't think so.
Q. Well, we'll never know because those documents, those emails were destroyed, right, Mr. Mulaney?
A. I have no knowledge of any emails being destroyed.
Q. Are you aware that Johnson & Johnson issued a document request that called for the production of your emails regarding the Guidant matter?
A. I believe at some point they did, yes.
Q. And those of Mr. Duwe as well, right?
A. I don't know Mr. Duwe.
Q. And Ms. Rhoten?
A. I don't know.
Q. Are you aware that Skadden was unable to produce any responsive emails from your email mailbox in this litigation?
A. I don't recall.
Q. Or from the folders on your email system?
A. I don't recall.
Q. Or from the backup tapes that Skadden makes?
A. I don't recall.
Q. Do you know that because the representation has been made that the emails in your email box for the pertinent period had been deleted?

A. I never deleted any of emails on my email box.
Q. I'm not saying who deleted them, but are you aware that no emails from your email box have been produced because whether auto-delete or otherwise, they didn't exist at the time Johnson & Johnson asked they be produced?
A. I'm not aware of that fact, no.
Q. Same with Mr. Duwe?
A. I'm not aware of that.
Q. Ms. Rhoten?
A. Not aware of the status of their emails.
Q. In fact, Mr. Mulaney, are you aware the only instances we have emails of yours are when we have them produced by other parties who were copied on those emails such as Guidant or Cravath, things look of that nature?
A. Am I aware of that? No.
Q. Are you familiar with something called a litigation hold?
A. Yes.
Q. Now, you recall that Guidant filed a lawsuit against Johnson & Johnson early November 2005, right?
A. Yes.
Q. And Skadden had filed that litigation on behalf of Guidant, right?
A. Yes.
Q. Did you receive a litigation hold from anyone at Skadden that told you to preserve pertinent documents when Skadden

filed the lawsuit against Johnson & Johnson in December 2005?
A. I don't recall.
Q. Did it occur to you that you might be required to preserve your emails?
A. I don't recall.
Q. Did it occur to you that it might be prudent to preserve your emails given the subject of that lawsuit?
A. I don't recall things about it.
Q. There was also a derivative lawsuit filed against Guidant and its directors pending in Indiana at or about the same time. Isn't that right?
A. I don't know.
Q. Do you recall that the subject matter of that lawsuit pertained to whether the board in agreeing to Section 4.02 had violated its fiduciary duties?
A. I don't recall.
Q. Did you receive a lit hold notice to preserve pertinent documents with regard to that lawsuit?
A. I don't know.
Q. So it didn't occur to you to preserve them given the subject matter of your lawsuit?
A. Well, nothing occurred to me because I don't recall a memory of that topic or the absence of a hold.
Q. Do you remember Wilson Sonsini who was representing the company in the Indiana action?

A. I'm aware of that.
Q. Boris Feldman was a partner?
A. Yes.
Q. Does that refresh your recollection about whether there was a lawsuit in Indiana that centered on whether the Guidant board had violated its fiduciary duties in connection with the merger agreement with Johnson & Johnson?
A. Well, I don't remember the specifics of the lawsuit.
Q. But you have no recollection of being asked to preserve your emails in connection with that lawsuit, right?
A. I don't recall.
Q. There came a time in January 2006 when you learned that the general counsel of Johnson & Johnson, Russ Deyo, had written to Mr. Kury in connection with Mr. Deyo's concern about Guidant providing information to Abbott. Do you remember that?
A. Yes.
Q. And Mr. Deyo's letter expressed concern that Guidant had violated the merger agreement by providing information to Abbott?
A. It raised -- yes, he articulated some concerns of that nature, yes.
Q. Didn't you conclude that Mr. Deyo's letter suggested that Guidant had violated Section 4.02?
A. Yes.
Q. Did you suggest to anyone at Guidant or at Skadden that a

lit hold notice should be disseminated to preserve documents related to the issues raised in Mr. Deyo's letter?
A. I don't recall.
Q. Now, the derivative suit lasted well into the fall of 2006, right?
A. I don't know.
Q. Before the Indiana derivative action was resolved, this lawsuit was filed, right?
A. I don't know.
Q. Well, do you recall that this lawsuit was filed in the fall of 2006?
A. That's my understanding.
Q. Did you receive a lit hold notice once this lawsuit had been filed?
A. I don't recall.
Q. You were aware of the general allegations in this complaint, right; that Johnson & Johnson alleged that Guidant had violated the merger agreement, right?
A. Yes.
Q. Did it occur to you that it would be prudent to preserve your emails that may support or contradict the testimony you are giving in court today?
A. I don't recall addressing the topic, but I did not delete any of my emails.
Q. But you took no steps to ensure that any Skadden procedure

for the automatic deletion of emails was terminated so that the emails that you and Mr. Duwe had and other emails could be preserved so that we might be able to take a look at them in connection with the claims and defenses in this lawsuit. Isn't that right?

A. I didn't take any specific steps with respect to email retention of Skadden, that's correct.

THE COURT: Were you aware of the email retention policies at Skadden, or maybe email destruction policies at Skadden is a better way to phrase it?

THE WITNESS: I believed, your Honor, that they were just generally kept.

THE COURT: You didn't realize that they were automatically deleted over a certain period of time?

THE WITNESS: No, I don't believe I was aware of that at the time.

THE COURT: OK.

Q. Your litigation partners would have been aware of that, right?

A. Well, we can ask them.

THE COURT: So you don't know one way or the other?

THE WITNESS: I do not know, your Honor. My practice is never to delete emails. And when I'm trying to dig up an old email, I normally search for it and find it, so my experience was they were always there.

Q. Did there come a time when you made an effort to go back and look for emails in this period of time?
A. With respect to this litigation?
Q. Mmm-hmm.
A. No.
Q. So until I just raised this with you today, you had no idea that the emails in your email box no longer exist. Is that right?
A. I believe in my deposition there was some dialogue about emails and what existed and what didn't exist, and I guess I was aware of that being a topic during the deposition, but the specifics of it, I have no firsthand knowledge of.
Q. Let's call up Kury Exhibit 50, please.
Mr. Mulaney, I am going to turn now to the end of January 2006, and we have already discussed this letter that Mr. Deyo sent. Mr. Kury asked you to prepare a response to Mr. Deyo's letter. Isn't that right?
A. Yes, he did.
Q. So let's turn to Mulaney Exhibit 25. This is the response that you drafted for Mr. Kury to send in response to Mr. Deyo's letter. Is that right?
A. Yes.
Q. Have you seen this document recently?
A. Yes.
Q. You have, all right. So you would agree with me --

withdrawn. What was the purpose of drafting this response?

A. Well, I guess most importantly to express Boston -- I'm sorry -- to express Guidant's incredulity that Mr. Deyo was making this allegation at this point in time for the first time and to say that we didn't believe our conduct had violated the merger agreement.

(Continued on next page)

Q. Well, you agree there's a disagreement in this case about whether this is the first time it had been raised, right?
You're aware that Mr. Deyo and Mr. Hilton testified they had raised the breach issue with Mr. Kury on January 9th?
A. I'm not aware of their testimony, and I find it very difficult to believe they had raised that issue with Mr. Kury on January 9th.
Q. In fact, the letter that you were responding to was referring to that phone call, Kury Exhibit 50, that we just looked at?
A. The letter I'm responding to references a conversation on January 9th, as to which Mr. Kury told me he had absolutely no recollection of Mr. Deyo saying that information had been given to Abbott in violation of the merger agreement, as distinct from asking to be assured that any information given to Boston Scientific or its representatives had not previously been provided to Johnson & Johnson. It was then so provided to Johnson & Johnson.
Q. And the first you heard of that call was when Mr. Kury brought the Deyo letter of January 23rd to your attention?
A. On January 23rd, yes.
Q. Now, in the draft response that you prepared, you'd agree with me that nowhere in this draft response do you assert that Abbott is a "representative"; is that right?
A. The word "representative" is not in this draft.

Q. Notwithstanding that, you have testified today that you had a conversation with Mr. Kury in which you used those words, that Abbott was a representative, right?
A. Both are true statements.
Q. Nor does this draft allude to Mr. Kury having received your advice prior to providing Abbott with information, right?
A. That's correct. That wasn't the purpose of the response.
Q. Now, in your trial affidavit, you make frequent reference to something called the passive market check and Guidant's right to exercise that. Would you agree with me that that rationale is nowhere in the draft that you prepared for Mr. Kury, right?
A. Those words are not in the response.
Q. Now, the substantive explanations that you included for giving Abbott due diligence -- or in the fourth and fifth paragraphs, and I'd like to start with the one that's premised on Abbott being a financing source, which is in the fifth paragraph. So let's call that up. Thanks, Marco.
Now, you say Abbott is providing financing through a purchase of certain assets, the acquisition of equity in Boston Scientific, and the provision of debt financing; do you see that?
A. Yes.
Q. But it's true, isn't it, that at the time that Abbott was provided diligence, you didn't know about the purchase of

equity, right?
A. There's no reference -- I'm sorry, at the time -- Could you repeat the question?
Q. As of December 22, when Abbott was given diligence, you were not privy to the discussions between Abbott and Boston and had no knowledge that Abbott was going to make an equity investment in Boston Scientific, right?
A. As of December 22nd, I believe that's correct, yes.
Q. And you didn't know about the debt financing, right?
A. I don't recall.
Q. Yet, you included that in your draft letter, draft e-mail response to Mr. Deyo as a basis for why Abbott could be given diligence, right?
A. Including the fact that Abbott was buying assets from Guidant.
Q. Well, I see that, but I'm referring to the two other pieces that you included in the draft response to Mr. Deyo. Notwithstanding the fact that at the time Abbott was given diligence, you didn't know about either of those two things, right?
A. Yes, but what I'm referring to is about the fact that Abbott was providing finance, in and of itself, by buying assets.
Q. Now, the next sentence reads: It is perfectly reasonable and appropriate for Boston Scientific's financing sources to

have access to due diligence information under an appropriate confidentiality agreement. Do you see that?
A. Yes.
Q. Now, leaving aside whether it's perfectly reasonable or appropriate, the issue is whether it's appropriate and permissible under the merger agreement, right?
A. Yes.
Q. But you don't say anything about the merger agreement in that sentence, right?
A. No.
Q. Now, the last sentence of this paragraph -- I'm sorry, the next sentence, that's right, makes reference to the fact that Abbott's involvement was entirely through Boston Scientific's doing; do you see that?
A. Yes.
Q. And if we go to the prior paragraph, the first sentence of that, I think, makes the same point, right? Boston Scientific. So the point your draft is making to Mr. Deyo is that Guidant didn't solicit Abbott, right?
A. Yes, in response to his allegation that somehow we violated the no-solicitation clause with respect to Abbott.
Q. Well, he wasn't complaining that Guidant had solicited Abbott, right? He was complaining that Guidant had provided information to Abbott in violation of the merger agreement, right?

A. No, wrong. If you look at his letter, in the fourth paragraph he's referencing the first part of 4.02(A), which says Guidant cannot direct or indirectly solicit, initiate or knowingly encourage, et cetera, any takeover proposal.
Q. Well, you understand that what triggered Mr. Deyo reaching out to Kury, whatever the subject matter was -- you don't recall because the parties have different recollections -- was occasioned by a conference call on January 9 in which the Boston Scientific CFO said that Abbott had been permitted a deeper dive into diligence, right?
A. Well, I can't begin to speculate as to what motivated Mr. Deyo's letter of January 23rd. I know what's in the letter.
Q. You couldn't --
A. Well, I couldn't begin --
Q. It would be speculation for you to conclude that what was bothering Johnson & Johnson was the provision of information to a third-party divestiture buyer while the J&J merger agreement was in force? That would require you to speculate, Mr. Mulaney?
A. Yes, when it's raised two weeks after the letter writer, Mr. Deyo, says he became aware of that fact. Very strange behavior for someone party to a merger agreement with an available remedy to it of seeking an injunction or specific performance.

Q. So let's continue with the next sentence in paragraph 4, and with regard to the provision of diligence to Abbott, you say: "This was consistent with Boston Scientific's December 5, 2005, press release in which it indicated it was prepared to divest Guidant's vascular intervention and endovascular businesses while retaining shared rights to Guidant's drug-eluting stent program;" do you see that?
A. Yes.
Q. I want to spend a moment on this. Now, haven't we already agreed that the December 5 proposal said nothing about when Boston Scientific would divest or line up its divestiture buyer vis-a-vis the signing of a -- excuse me -- giving a firm offer to Guidant? Let me try that again.
Do you agree that the December 5 -- I think you've agreed that the December 5 proposal doesn't say anything about the timing of when Boston Scientific is going to line up its divestiture solution, right?
A. The letter, in and of itself, doesn't say when that is going to occur, but as I said earlier, my memory is that in the analyst's call, Boston Scientific had, after announcing its offer, they talked about one of the sources of financing for the transaction being the divestiture.
Q. Right, but that -- well, we don't have to revisit about whether that's consistent with hell or high water or other alternatives.

A. But it is an expression of Boston's intentions as to how it intends to formulate a takeover proposal.
Q. Now, the next sentence you say, this divestiture was also contemplated by Boston Scientific's draft merger agreement forwarded to you in December; is that right?
A. That's what the next sentence says.
Q. And am I right that the -- what you are suggesting here with that, that because Mr. Deyo had the draft Boston Scientific agreement, J&J was on notice that Guidant was already providing information to a potential divestiture party; that J&J should have realized that?
A. What I was suggesting was that the draft was consistent with the proposition that there would be a divestiture candidate as part of the definitive Boston Scientific proposal.
Q. Well, the issue here is that Abbott was provided diligence before the J&J merger agreement was terminated, right?
A. That would appear to be the issue, yes.
Q. Right. And the agreement between Boston Scientific and Guidant couldn't be executed until -- unless and until the J&J merger agreement had been terminated, right?
A. Correct.
Q. So whatever it is that's in the Boston Scientific merger agreement could not take effect until Johnson & Johnson had left the scene, right?
A. Couldn't be entered into until we terminated the Johnson &

Johnson agreement, yes.
Q. All right. Well, let's take a look at the agreement, Kury Exhibit 36, and what I'm going to be asking you to do, Mr. Mulaney, is point to where in the agreement it puts J&J, Mr. Deyo in particular, on notice that Guidant would have already been providing information to a potential divestiture party. And I think it's section 5.03, right? That's the divestiture section?
A. No. 5.03 appears to say reasonable best efforts.
Q. Right. Well, is this the paragraph that pertains toy -- I can be more general.
What in the draft agreement that was provided to Mr. Deyo in December, in your view, put him on notice that Guidant had been providing information to a third-party divestiture candidate while the J&J agreement was still in force?
A. Well, I have to review this agreement in some detail to answer your question. I haven't looked at it in a long, long time.
Q. Well, let me ask a follow-up question. It's fair to say that the fact that Abbott has already been lined up and been given diligence does not appear in the Boston Scientific draft merger agreement provided to Mr. Deyo at the end of December, right?
A. I don't know. As I said, I haven't read it. I suspect

Abbott is not named in this agreement.
Q. If we could go to Mulaney Exhibit 22, please. Now, this is an e-mail that Alison wrote and distributed in connection with the January 10 board meeting, and I want to specifically point you to page ending in Nos. 8311, which is the project B transaction summary, and in particular the subject: Obligations to obtain antitrust approvals. Do you see that?
Let me just back up. When these types of documents are prepared -- let me go back even further.
There's a document number at the bottom, right, and that reflects that this document was, at least at one point in time, on the Skadden Chicago server; is that fair?
A. Yes, I believe that's what that indicates.
Q. And did Skadden Arps prepare this summary?
A. Yes.
Q. Now, obligations to obtain antitrust approvals, there's a reference to Guidant and Boston, right? Shelby is Guidant?
A. Correct.
Q. And the first sentence says that Guidant and Boston are required to use their reasonable best efforts to obtain required antitrust approvals, including by divesting certain specified businesses, if necessary, right?
A. That's what it says.
Q. And that's a summary basically of 5.03, isn't it?
A. I have to read 5.03 to answer your question.

Q. The next sentence says, quote -- well, I won't say quote. It says, Boston has executed a transaction agreement with Abbott whereby Boston would divest Guidant's VI and ES businesses to Abbott; do you see that?
A. Yes, using the word "Apple" for Abbott.
Q. And that isn't in the draft agreement, or at least you don't believe it is, right?
A. The name Abbott?
Q. Anything about them, the transaction agreement itself having been executed?
A. Sorry, I can't answer a question about a document I haven't read for over ten years.
Q. All right. Let's go to Kury Exhibit 36. Is this Kury 36, Marco? Thank you.

So this is the e-mail that Mr. Kury sent to Mr. Deyo, cc Mr. Hilton at Johnson & Johnson, and Bob Townsend at Kravath, on December 31 and in which he wants to update them on the discussions with Boston Scientific.

And I want to highlight one sentence there. There we go. Mr. Kury says that: Guidant's continuing to provide Boston with information regarding Guidant as permitted by our November 14 merger agreement. As you know, in circumstances where we provide information that was not previously provided to J&J, we have provided you with copies or otherwise made the information available to you on the same basis as we have to

Boston Scientific. Do you see that?
A. Yes.
Q. So you would agree with me that nowhere in there is Mr. Deyo alerted to the fact that what's in the works is a proposal whereby Abbott would buy some of Guidant's assets, if Boston Scientific is to make a firm offer? That's not in there, right?
A. It's not in this e-mail.
Q. So when we go back to Mulaney 25, the draft that you prepared for Mr. Kury to respond to Mr. Deyo, you refer to this draft, but there's nothing in this communication on December 31 that would alert Johnson & Johnson to the fact that Guidant had already been providing information to a potential divestiture party while the J&J merger agreement was in play, right?
A. As I said, I'd have to review the draft agreement before I could answer your question.
Q. All right. So if the agreement has it, they were on notice, and if it doesn't, they weren't; is that fair?
A. Could you direct me again to the response?
Q. Are you talking about --
A. The response to Mr. Deyo.
Q. Sure. Mulaney 25. This is in the fourth paragraph, which is one of the substantive -- or explanation for how Abbott could be permissibly receiving information. And one part of your explanation was in the sentence that said: This

divestiture, presumably the one to Abbott, was also contemplated by the draft merger agreement forwarded to you in December?
A. Yes, I see that wording.
Q. Yes, sir. You see the wording? Okay.
A. Yes, but I'm aware of at least one draft merger agreement from Boston Scientific that does have express reference to a simultaneous closing transaction with respect to divestiture of assets.
Q. A closing, right? Which is consistent with, we now have our Guidant/Boston deal, and now we're going to go find that divestiture party and, by the way, we're not going to close until it's lined up; that's what that provision says, right?
A. No, that's not what I just said. What I said was I'm aware of a Boston Scientific agreement that references, at the closing of the Boston Scientific acquisition of Guidant, a simultaneous transaction of assets being sold.
Q. Again, completely consistent to the reader with that divestiture being lined up after Boston has signed its definitive agreement and after the J&J merger agreement has been terminated?
A. No, for the third time. The agreement that I remember has a provision that contemplates that simultaneous with and not after, simultaneous with the closing of Boston Scientific's acquisition of Guidant, there would be an asset sale.

Q. But the timing of that asset sale is at the closing of the deal when Boston acquires Guidant, or what's left of Guidant after the divestiture, right?
A. Yes, simultaneous with it. Some of the proceeds from it are what Boston Scientific is using to pay the Guidant stockholders, some of the purchase consideration.
Q. But that clause doesn't inform the reader as to whether lining up that purchaser for closing is done before or after the Boston Scientific merger agreement is signed, right?
A. I believe it referenced an agreed-upon closing.
THE COURT: But the closing is going to take place long after the merger agreement with Boston Scientific, right?
THE WITNESS: Yes, yes.
THE COURT: So there's nothing in the proposed merger agreement that says Abbott's going to be the divestiture partner, right?
THE WITNESS: Nothing in this -- nothing in the December draft agreement, I believe, identifies Abbott as the divestiture candidate, yes.
THE COURT: So a person reading this cold would have no way of knowing whether or not the divestiture candidate, which was already announced as a likely prospect in December, would have no way of knowing whether that entity was going to be lined up before or after the merger agreement, right?
THE WITNESS: See, there, your Honor, I don't -- I

think because my memory is Boston Scientific indicated that part of its financing package for the transaction involved divestiture proceeds and that, I believe, they indicated that as early as December 5th when they made the proposal. It was not in the specific letter to Guidant, but I believe they indicated one of the ways they were financing the proposal was to sell assets, which would, one, finance the proposal and, two, solve an antitrust problem. I believe that's what stopped it.

THE COURT: All right. Go ahead.

Q. And that financing would be available at the closing of the Boston Scientific deal, at that closing?

A. Yes.

Q. Okay. But as to when that divestiture candidate would be identified and lined up, the draft agreement that had been provided to Mr. Deyo said nothing about whether that divestiture purchaser had to be lined up before the Boston merger agreement was signed, right?

A. Mr. Coffey, I'm not trying to be difficult. I can't answer questions about an agreement I haven't read for over ten years.

THE COURT: Well, you have a recollection now that, at some point prior to this draft Boston Scientific merger agreement, that there was a public disclosure about the merger agreement being contingent on lining up a divestiture partner who was ready to sign?

THE WITNESS: No, I don't think there was -- No.

THE COURT: No. All right.

BY MR. COFFEY:

Q. I want to talk now about the balance of this paragraph four in which you refer to both the financing aspect, in part, by divestiture and then after that, the -- in addition, the takeover proposal may be made by one person or a number of joint bidders, and it's actually the last piece I want to say. You actually say the same thing in your trial affidavit in the paragraph 68 that the takeover proposal could involve more than one bid, right?

A. Yes.

Q. You're not saying that's what happened here, are you?

A. The rationale for Guidant's conduct was not based on Abbott having made a takeover proposal, but they came very close to being the maker of a takeover proposal.

THE COURT: Well, did you consider them to be a joint bidder, Abbott and Boston Scientific, joint bidders?

THE WITNESS: At the time of January 9th, your Honor, yes, and that's how the Guidant board analyzed Boston Scientific's bid and the strength of it and the likelihood that it would close.

THE COURT: Well, at what point did you consider Abbott to be a joint bidder along with Boston Scientific?

THE WITNESS: Well, certainly as of January 9th, when we got a takeover proposal, a definitive takeover proposal. It was clear that, as encompassed within the definition of takeover proposal in the agreement, Guidant -- I'm sorry, Abbott was indirectly buying assets from Guidant, and at that point, could be considered the maker of a takeover proposal.

Now, Abbott did not, itself, communicate a proposal to Guidant. That is true. We, Guidant, did not specifically give notice to Johnson & Johnson that Abbott had made a takeover proposal or was a joint bidder as part of a joint takeover proposal, that is true too.

THE COURT: Wouldn't Guidant have been required to do that under the J&J merger agreement, if that were the case?

THE WITNESS: Yes, but on January 9th we, in effect, did give Johnson & Johnson notice of Abbott's participation.

THE COURT: But that was after the due diligence had already been provided --

THE WITNESS: Correct.

THE COURT: -- two weeks?

THE WITNESS: Correct.

THE COURT: All right.

BY MR. COFFEY:

Q. Let me make sure I understand this.

A. The appropriateness of providing due diligence to Abbott doesn't turn on prior notice to Johnson & Johnson.

Q. Now, you remember during your deposition you were asked whether you had reached a conclusion about whether Abbott was a joint bidder before -- you hadn't reached that question at the time Abbott was provided diligence because you had other grounds to -- for that to go forward; is that right? Do you remember that?

A. Yes.

Q. I think you said something along the lines of, we didn't need to reach that quest, or something along those lines. Does that sound familiar?

A. Yes, it does.

Q. But wasn't Skadden Arps required to reach that question? Wasn't it required to reach that question once it was presented to reach an answer?

A. No, because we had an independent basis for providing information or allowing Boston Scientific to provide information to Abbott, separate and apart from whether or not Abbott was a maker of a takeover proposal.

Q. Okay. I hear your testimony on that being the basis -- there being a basis to give diligence, but separate and apart from the diligence question, wasn't Guidant required to tell J&J who was making the joint takeover proposal? Weren't they required to do that?

A. Yes, if there was a joint takeover proposal, and on January 9th, Johnson & Johnson received from Guidant the draft Boston Scientific merger agreement, and they received the draft agreement between Boston Scientific and Abbott.

So as of that date, both with the receipt of the agreements and with the public announcement by Boston Scientific of their proposal, Johnson & Johnson knew that Abbott was going to purchase assets and that Boston Scientific's proposal would be facilitated by the financing as a result of that purchase, and the antitrust issues would be addressed as a result of that purchase. It's quite public and known to everyone.

THE COURT: 4.02(C) says the company shall promptly advise the parent, which is I guess J&J, orally and in writing of any takeover proposal, the material terms and conditions of any such takeover proposal, and the identity of the person making any such takeover proposal.

THE WITNESS: That's correct, your Honor.

THE COURT: So you didn't think you had to do that until January when you provided the due diligence in December?

THE WITNESS: No, your Honor. We weren't relying on Abbott being the maker of a takeover proposal as the rationale for our conduct.

THE COURT: So what's it doing in this letter?

THE WITNESS: What it's doing in this letter is it is responding to Mr. Deyo's broad-based allegation that somehow the merger agreement had been violated because both Boston Scientific and Abbott had combined to come up with a takeover proposal.

THE COURT: But what's the point of shooting down an argument that isn't being made? I don't understand. Why address the issue of a joint bidder when you're saying now that they never were a joint bidder?

THE WITNESS: Because Mr. Deyo's letter was read as complaining that Johnson & Johnson was deprived of something they had bargained for, i.e. some set of rules that would have prevented Abbott from cooperating with Boston Scientific to formulate the kind of Boston Scientific proposal that came forward, and that that was -- that somehow, Johnson & Johnson thought they had created a merger agreement that prohibited that from occurring. They didn't.

Abbott could have been a joint bidder. They technically weren't treated as such by Guidant. It's not the rationale for Guidant's behavior, but Mr. Deyo expressed incredulity that Johnson & Johnson could have its offer bested, if you will, by two companies getting together to make a takeover proposal.

BY MR. COFFEY:

Q. That wasn't what was bothering him, right, it was the fact that diligence had been given to someone never identified to Johnson & Johnson as a maker of a takeover proposal at a time when Johnson & Johnson had an in-force merger agreement with Guidant; that was his issue, right?

A. No, as I said before, I disagree with that. The first allegation, one of the paragraphs of his letter, is that Guidant's conduct presumably violated the first part of a 4.02(A) that is, soliciting a takeover proposal, as if we somehow brought Abbott into the picture. And that's why the response says, we did not bring Abbott into the picture.
Q. Now, under 4.02(C), as the Court just pointed out -- Well, let me ask a threshold question. The ability of Guidant to do the things permitted under 4.02(e)(x) and (y) is contingent on and subject to complying with section 4.02(C); isn't that right?
A. Could you repeat the question again? I'm sorry.
Q. Guidant's ability to respond to a takeover proposal is contingent and subject to its compliance with section 4.02(C); isn't that right?
A. No, I don't think that's a fair reading of the interplay of those sections. Guidant should comply with 4.02(C), I agree with that.
Q. Well, let's go to 4.02(A) at 6227, and this again, is the provision --
A. I'm sorry, can you give me the --
Q. Sure. Yes, sir. It's internal Page 38 of the merger agreement.
A. But which exhibit?
Q. Kury Exhibit 9. Now, on the bottom of the prior page we

have the what Guidant shall not do piece, and then on the part that carries over, it says: Notwithstanding that, if there is a takeover proposal that the board deems could be superior, it can do two things, right? It says the company may, and then there's (x) and (y); do you see that?
A. Yes.
Q. But what the company may do, right, is expressly subject to compliance with 4.02(C); isn't that right? So there's no ambiguity of the interplay between the two sides?
THE COURT: Well, let's just let him answer that question, isn't that right? Subject to compliance with 4.02C.
THE WITNESS: Yes, it is subject to it.
THE COURT: Okay. And the way it's written here, would suggest that compliance with 4.02(C) is a precursor to exceptions (x) and (y). Do you think that's a fair reading?
THE WITNESS: Yes. I do, your Honor.
THE COURT: Okay. So you've got to give notice to Johnson & Johnson before you can furnish information to the takeover proposer?
THE WITNESS: If you're treating Abbott --
THE COURT: Well, any takeover proposer, Boston Scientific or anybody else. They can't get this stuff until Johnson & Johnson has first been notified, correct?
THE WITNESS: Correct.
THE COURT: All right.

THE WITNESS: And Johnson & Johnson was so notified about Boston Scientific's takeover proposal.

THE COURT: All right. But 4.02(C) talks about the identity of the person making any such takeover proposal?

THE WITNESS: Yes, Boston Scientific.

THE COURT: Right. But if you meant to say, or Mr. Kury meant to suggest that the takeover proposal was joint, that joint bidders included Boston Scientific and Abbott, with that premise, then you'd have to tell Johnson & Johnson about Abbott before you gave Abbott these materials, right?

THE WITNESS: That is correct, your Honor.

THE COURT: Okay.

THE WITNESS: But that was not -- that was really not the purpose of the response to Mr. Deyo.

THE COURT: All right. Well, let's talk about that. So the response to Mr. Deyo, third paragraph: As to whether providing information to Abbott constitutes a violation of the no-solicitation provisions, please note that Boston Scientific brought Abbott into the transaction as part of Boston Scientific's takeover proposal.

And then you go down to the last sentence: In addition, the takeover proposal may be made by one person or a number of joint bidders.

THE WITNESS: Correct, your Honor.

THE COURT: But you weren't endeavoring to say or suggest that Mr. Kury was endeavoring to say that Abbott was a joint bidder?

THE WITNESS: No, we were not, your Honor.

THE COURT: So what's the point of that sentence?

THE WITNESS: Well, it's a rhetorical point that Mr. Deyo's letter, interpreted as complaining that Abbott had helped Boston Scientific for the takeover proposal, was somehow a violation of the agreement. It just isn't the agreement or the bargain that Johnson & Johnson had struck. It's not an attempt to explain the legal rationale for Guidant's conduct.

It's trying to answer, if you will, rhetorically, Mr. Deyo's letter of January 23, which, first and fundamental, struck us as a very bizarre, strange communication, the exact motivation for which we were quite confused about, given the delay in which it was transmitted and the fact that this was the first time in -- since January 9th that I heard from anyone that there was some issue about whether or not Abbott getting due diligence somehow violated the merger agreement.

And between January 9 and January 23rd, we had -- on January 11th, Mr. Deyo, his CEO, Mr. Weldon, Mr. Kury and the CEO of Guidant, Jim Cornelius, had met and Johnson & Johnson had said, Guidant, you now have an offer from Boston Scientific. We're going to up our $64 offer.

THE COURT: No, I get all that. So I'm asking so what on earth was the point of the last sentence of the third paragraph -- I guess it's actually the fourth paragraph of your proposed letter for Mr. Kury's signature?

THE WITNESS: Making the rhetorical point that, Russ, what happened could have happened under the merger agreement you signed. Why are you complaining? And most of all, why are you complaining at this late hour, with the delay in time between the 9th and now?

THE COURT: But it couldn't have happened under the agreement they signed, unless you first provided notice --

THE WITNESS: True.

THE COURT: -- that Abbott with was a joint bidder.

THE WITNESS: True.

THE COURT: Which you are now saying you weren't suggesting at all?

THE WITNESS: We're not saying that was our legal rationale. Making the rhetorical point that had we given that notice, had we deemed Abbott to be a joint bidder formally, that the Boston Scientific transaction would proceed as it had proceeded and you, Johnson & Johnson, would be faced with the proposition we thought they weren't faced with.

Do you want to bid more or not? It's a rhetorical point, your Honor. It's not an attempt at explanation for the legal propriety of our conduct, and as I say, one could ask the question, why do you say this in your response? You have to understand the context and the way Mr. Deyo's letter was received.

THE COURT: I'm not sure what is the point of nonresponsive rhetorical points, but maybe I just debate differently than some.

THE WITNESS: Well, the only explanation I can proffer, your Honor, is we found Mr. Deyo's letter to be very strange in motivation and timing, and there were rhetorical aspects to the response.

THE COURT: All right. Mr. Coffey, some more questions?

BY MR. COFFEY:

Q. Yes. I'd like you to turn to Mulaney Exhibit 21, please, in your binder, and it's an e-mail chain in late December 2005 involving yourself as cc, but primarily between Mr. Duwe and Mr. Kury. And we'll step through this.

If you look at the earliest e-mail in the chain, Mr. Duwe is giving Mr. Kury an update on what's going on, it's been relatively quiet, et cetera; do you see that?

A. Well, it's a long chain.

Q. I'm not going to ask you anything other than, do you see that? I'm not going to ask any questions on this particular e-mail. I'm just trying to orient you.

A. Yes, okay.

Q. So the next e-mail in the chain, Mr. Kury asks Mr. Duwe about questions he had e-mailed about a press release; do you

see that?
A. Yes.
Q. So this is an example of an instance in which Mr. Kury not only -- was reminding Skadden and had e-mailed certain questions about a certain topic, correct?
A. It was an e-mail asking about answers to his question, yes.
Q. Right. Now, we'll step through the next couple of e-mails pretty quickly. He responds to that, and then he asks a question: Hey, when we get the Boston offer, are we obligated to give Johnson & Johnson immediate notice, including the detailed terms, even if we haven't made a board decision? Do you see that?
A. Yes.
Q. And then Mr. Duwe responds: You'll need to give them a copy as soon as practicable, and it talks about when that might be done and et cetera. And I'm actually moving up a couple more. Let's go to the next one.
And then Bernie Kury asks if he can miss, or do we have to give them every -- can we have the one before that, Marco? The one before that. Sorry. All right.
Maybe you could see it in the document. Mr. Kury responds: If we give them this draft, are we going to have to give them every draft, such as your markup and every set of drafts. What I want to focus on is Mr. Duwe's response to that.

Now, in the first sentence Mr. Duwe says: "Section 4.02(C) provides that Guidant will provide Johnson & Johnson copies of all correspondence and other written materials sent or provided to Guidant from any person that describes any of the terms or conditions of any takeover proposal." Do you see that?
A. Yes.
Q. Do you agree with Mr. Duwe's interpretation of 4.02(C)?
A. Yes, I do.
Q. Okay. He also says a little later on: We also have a more general obligation to keep Johnson & Johnson fully informed in all material respects of the status and details of any takeover proposal; do you see that?
A. Yes, I do.
Q. And do you agree with that?
A. Yes.
Q. And the point that Mr. Duwe is making here to Mr. Kury, that Guidant has a general obligation to keep Johnson & Johnson "fully" informed. That word "fully" isn't just an accident, right? That's in the merger agreement, that Guidant has to keep J&J fully informed, right?
A. The world "fully" is in the merger agreement, yes.
Q. And, indeed, that was a word that Johnson & Johnson had specifically bargained for, right, fully informed; isn't that right, Mr. Mulaney?

A. I don't know that they specifically bargained for the word "fully." It's in the merger agreement, along with "fully informed in all material respects."
Q. Well, didn't Skadden want to take out the word "fully"?
A. I don't recall.
Q. All right. Let's turn to Kury Exhibit 5, and you'll see it's an e-mail from Michael DeFrank at Skadden to a number of folks, and it's Skadden's markup. Among the folks it is sent to are Kravath and Jim Hilton at J&J. And I want to direct your attention to Bates No.s 4408, and you see here that Skadden has struck the word "fully" and put in "reasonably;" do you see that?
A. Yes.
Q. Now, ultimately, Kravath and J&J said no, and the word "fully" was put back in the agreement; isn't that right?
A. Yes, but there was also inserted the language "in all material respects" at the same time.
Q. Well, you had put "reasonably in all material respects" and Johnson & Johnson, through Kravath, said, no, "fully informed in all material respects," right?
A. Yes. We went from "fully informed" to "fully informed in all material respects."
Q. Okay. But the difference between what you proposed, "reasonably informed in all material respects," that was a difference between that and what ended up in the agreement,

which is "fully informed in all material respects," right?
A. Yes.
Q. And you would agree that one who wants to be fully informed in all material respects wants to be told more information than merely reasonably informed in all material respects, right?
A. You know, we're slicing the onion awfully thin. Once you put in the words "in all material respects," I think the operative wording is "in all material respects."
Q. Well, suffice it to say that 4.02(C) was a term that both sets of lawyers on either side of this deal were paying attention to, right?
A. That's a fair statement.
Q. And that what ended up in the agreement was that Guidant had an obligation to keep Johnson & Johnson fully informed in all material respects on the status and details of any takeover proposal, right?
A. Yes.
Q. And this is the term that Mr. Duwe was referring to in his December 30 e-mail, right?
Let's go back to that. Mulaney Exhibit 21. Now, the next e-mail, Mr. Kury asking, what's the realistic downside of not furnishing now, they terminate for breach? Do you see that?
A. Yes.
Q. So he's asking for advice on issues that could trigger a

claim of breach, fair?
A. He's asking for the advice he's asking for, yes.
Q. So Mr. Duwe responds in the next e-mail, starts off by saying, you know, it's probably not likely to lead to an issue, but -- it continues, but our right, under the agreement, to terminate for a better deal or change our recommendation is, "subject to section 4.02(C)," which is the provision requiring us to provide, among other things, copies of written materials describing the terms of the proposal. If we fail to comply with 4.02(C), Johnson & Johnson could at least potentially assert that we aren't entitled to terminate to take the Boston proposal; do you see that?
A. Yes.
Q. Do you agree with Mr. Duwe's analysis of section 4.02(C)?
A. Yes.
Q. Did you agree with it at the time?
A. Yes.
Q. All right. Actually, the next e-mail up, Mr. Kury wants to know if you concur, right? You're Chip? Do you see that?
A. Yes.
Q. And then the next e-mail from Mr. Duwe says that you and he have discussed it, he understands, you agree, and then noticed you hadn't weighed in directly on the series of e-mails, but he imagines that you will.
Now, Mr. Kury then asked him to draft an e-mail to

Russ, and he does, and we've looked at what was sent. I think it was Kury Exhibit 36, which we've analyzed already. I can show it to you, if you want. That's the cover e-mail that Mr. Kury sent to Mr. Deyo. Right there. We go on. December 31, that enclosed the draft Boston Scientific agreement. That's what happened.

And I think we've already established that, notwithstanding the interpretation of 4.02(C), Mr. Kury says nothing in here about the fact that Abbott is playing a role in the transaction, right?

A. As of December 31st, Abbott was known to be receiving confidential information, and whether or not they would play a role in the transaction had yet to be determined.

Q. You had yet to determine it, right?

A. Sorry?

Q. Withdrawn.

Now, before this e-mail and the prior e-mail we looked at, the Duwe-Kury back and forth on December 30, Guidant had agreed to a request by Boston Scientific not to reveal the existence or identity of any third-party divestiture candidate; isn't that right?

A. I believe that's correct, yes.

Q. That was in the addendum?

A. I believe that's right, yes.

Q. Now, let's show Kury Exhibit 18. Now, the request to put

that language in came from Boston's lawyers at Shearman Sterling, right?
A. I believe that's right, yes.
Q. Right. And we've put on the screen the language that I want to focus on. Boston Scientific asked Guidant to agree that, in no event shall the existence or name of any third party, who is a potential purchaser for the company's assets when divested, be disclosed by the company to any person without the prior express written consent of Boston Scientific and such third party; do you see that?
A. Yes, I do.
Q. And notwithstanding the provision of section 4.02(C), whereby Johnson & Johnson had negotiated to be fully informed in all material respects regarding any takeover proposal, Guidant agreed to this language; isn't that right?
A. That's right because the language talks about a potential purchaser, not an actual purchaser, and until an actual purchaser agrees to be part of Boston Scientific's takeover proposal, it's not a material term of the Boston Scientific takeover proposal.
Q. How about on December 20th, when you learned that Abbott is the candidate for the third-party divestiture, is that something that you, a person who wants to be fully informed in all material respects, would be expecting to learn about?
A. I don't think so because their potential interest hasn't

fundamentally changed Boston Scientific's proposal, which is their offering of consideration and they're seeking to find a divestiture purchaser. Until someone becomes a divestiture purchaser, nothing material has changed in Boston Scientific's proposal.
Q. How about the fact that Guidant was providing information to a third-party divestiture candidate in order to facilitate an antitrust problem that had been brought to Guidant's attention during the discussions and negotiations? Wasn't that a material event that -- a material fact that one who wants to be fully informed on such matters would have wanted to know?
A. I don't think it's a material change in Boston Scientific's proposal to us.
Q. Now, do you recall that the reason Shearman -- do you recall that the reason Shearman and Sterling wanted to add this language is because they did not want Johnson & Johnson to learn the identity of potential purchasers because that might screwup the deal that Boston was working on? Do you remember that?
A. No, I don't remember that characterization of the reasons.
Q. They were afraid it might queer the deal, right? Their words, not mine.
A. I'm sorry, I don't recall that characterization of the reasons.
Q. All right. So let's look at Mulaney 7, and see if we can

help refresh your recollection. Mulaney 7, document produced in discovery, and you see up there it's got the Guidant -- that's the client, the Guidant, Skadden matter number for Guidant, right?
A. I don't recall. Looks like it could be.
Q. And the name A. Rhoten for Alison Rhoten is next to it?
A. Yes.
Q. And this is her notebook?
A. It would appear to be.
Q. All right. Let's turn to Page Bates No. 4206, and it's Wednesday, 12-14. This is the same day that the Sherman lawyer sent over the addendum with the language that Guidant was being asked to agree to, which would prohibit them from identifying to anyone, including Johnson & Johnson, the identity of potential buyer; do you see here --
THE COURT: Is that your speech, or are you asking him to agree to that? Do you agree that's the same day as --
THE WITNESS: I don't know for a fact. If he so represents, I'm prepared to accept it.
MR. COFFEY: Yes, your Honor. I'll represent that that's the day that Sherman and Sterling sent it over, was December 14th.
BY MR. COFFEY:
Q. Now, the handwriting here, Miss Rhoten's note is: Clare O'Brien, colon, doesn't want Guidant to tell J&J identity of

potential acquirers of divested assets, fear that J&J will queer the deal; do you see that?
A. Yes, I do.
Q. Does that refresh your recollection that the reason that Sherman and Sterling, on behalf of Boston Scientific, wanted to keep the identity of the potential purchaser secret from Johnson & Johnson was because they feared that Johnson & Johnson would use that to, quote, unquote, queer the deal? Does that refresh your recollection?
A. No, it doesn't.
Q. Is it correct that you do not recall considering whether Johnson & Johnson should be notified that Abbott was receiving due diligence?
A. I don't have a specific recollection of considering that question at the time. I'm very clear at the time I didn't think there was any requirement to give Johnson & Johnson notice of possible divestiture purchasers because I did not think it a material term or material change in the Boston Scientific proposal.
Q. Well, my question is, at the time, did you consider whether or not Johnson & Johnson should be notified that Guidant had provided due diligence to Abbott?
A. And my answer is, I don't specifically recall it either way, but I am of the opinion, I think I was then of the opinion, that it wasn't required.

Q. Is it correct that you have no recollection of having discussed that particular topic with Mr. Kury?
A. I have no specific recollection.
Q. And I understand you have no -- Do you have any recollection of the board of Guidant authorizing Guidant management to provide information to potential purchasers of assets to be divested?
A. Specifically? No.
Q. By the way, you understand that Johnson & Johnson is not alleging that the Guidant board did anything wrong here; are you aware of that?
A. I'm not aware of the full scope of Johnson & Johnson's allegations.
Q. Now, there came a time when Mr. Kury sent the draft you had given him, substantially identical. I think there's a phrase "to Johnson & Johnson" that's deleted, but otherwise, identical. Do you recall that Mr. Kury forwarded essentially verbatim to Mr. Deyo?
A. Yes.
MR. COFFEY: And just for the record, I don't think we need to show it, but it's Kury Exhibit 51 is that letter.
Now, shortly after --
THE COURT: Do you want to look at it?
THE WITNESS: No, that's all right.
BY MR. COFFEY:

Q. Well, what I do want you to look at is Kury 57 because shortly after Mr. Kury sent that on to Mr. Deyo, he sent you an e-mail at Kury Exhibit 57, didn't he?

And having received your draft and having essentially forwarded, as is, on to Mr. Deyo at Johnson & Johnson, he then e-mails you and Mr. Duwe and says, "But seriously, folks, what is the technical analysis of whether Abbott is a bidder?" And then notes that he's reachable.

A. No, I don't understand the sequence of e-mails to be as you recited.

Q. All right. Let's sever the sequence. And you got an e-mail. Do you remember getting this e-mail?

A. Yes.

Q. And --

A. But I didn't get it after midnight.

Q. Well, I will stipulate, and I think my colleagues and perhaps even my colleagues in the back bench will agree that the time stamps on these are uneven. This might be Greenwich Mean Time. We just don't know; so I'm not going to represent to you that the time on this is exactly four minutes to 1:00 in the morning.

MR. BOIES: Our understanding is that it's Greenwich Mean Time.

MR. COFFEY: Right. Okay.

THE COURT: But you remember getting an e-mail that begins "But seriously, folks"?

THE WITNESS: Yes, I do.

THE COURT: Not a typical way for an e-mail to begin, I assume?

THE WITNESS: Correct.

THE COURT: Okay. Good.

BY MR. COFFEY:

Q. And having looked at this now, do you recall or not recall that this came after he had forwarded what you had drafted for him and Mr. Deyo?

A. I think it was before.

Q. Now, would you agree with me that this e-mail suggests that prior to him sending this e-mail, he had not been privy to any technical analysis of Skadden Arps, as to whether Abbott was a bidder? Is that a fair interpretation of this e-mail?

A. No. I think he's asking what's the technical analysis. I recall earlier in December generally discussing with Mr. Kury what could happen when we didn't know exactly how things would play out, that it's possible that a divestiture candidate could join with Boston Scientific to make a takeover proposal, given the broad definition of takeover proposal.

That didn't happen, but we did talk about the possibility that there are two companies joining together to make a takeover proposal.

Q. But you don't have any recollection of ever providing him

that analysis; isn't that right?
A. No, I just answered that we talked about it in the general terms I indicated.
THE COURT: Wait. Let me ask this question. Kury 51 is a draft letter to Mr. Deyo, right?
THE WITNESS: Yes.
THE COURT: And you drafted this?
THE WITNESS: Yes, I did, your Honor.
THE COURT: And so the paragraph that we've been talking about is the third paragraph, in addition -- the last sentence: In addition, a takeover proposal may be made by one person or a number of joint bidders, right?
THE WITNESS: Yes.
THE COURT: And you just told me that was a rhetorical point.
THE WITNESS: Yes, your Honor.
THE COURT: And Kury 57 is after that e-mail, right?
THE WITNESS: After he received my draft.
THE COURT: All right. And the e-mail is, "But seriously, folks, what is the technical analysis of whether A is a bidder?" Do you understand him to be referring to the very sentence that I was asking you to focus on before?
THE WITNESS: Yes, I did, your Honor.
THE COURT: Okay. And that was whether there's some technical analysis as to whether Abbott is a bidder, correct?

THE WITNESS: Yes, Judge.

THE COURT: And did you have a conversation with him about it?

THE WITNESS: I believe we did.

THE COURT: And what did you tell him?

THE WITNESS: I said our rationale is not that they're a joint bidder, although, they could have been and they came close to it, and that on January 9th -- you've heard it before, your Honor -- we did notify Johnson & Johnson that Abbott was the divestiture purchaser. Our rationale was that --

THE COURT: No, I just want to know what you told him.

THE WITNESS: I told him our rationale for our conduct under the merger agreement was that Abbott was a representative of Boston Scientific under the merger agreement.

THE COURT: So you told him what you just told me, that this was a rhetorical point?

THE WITNESS: Yes, your Honor.

THE COURT: Words to that effect?

THE WITNESS: Yes, your Honor.

THE COURT: All right. Mr. Coffey, you may proceed.

BY MR. COFFEY:

Q. Do I understand that you're now saying that in response to this e-mail, you picked up the phone and called him? Is that what you're saying?

A. I don't know if I picked up the phone and called him. I

believe we had a conversation in response to his e-mail.
Q. All right. Would you please turn in your deposition to Page 251, Line 24, and follow along with me, please?
THE COURT: Page 251?
MR. COFFEY: Page 251, yes, your Honor, Line 24.
Q. And I'm going to ask you to read along, Mr. Mulaney, and see if you recall being asked this question by Mr. Weinberger and giving the answer:
"Q. After you submitted your draft to him and after the date of this e-mail, which I understand you don't recall receiving, he says 'I'm reachable until about midnight New York City time.' Do you remember providing him any -- even though you may not have remembered receiving the e-mail, do you remember receiving -- providing him with a technical analysis of whether Abbott was a bidder?"
There's an objection. Mr. Weinberger clarifies.
"So I'm not asking you about your earlier conversation with him?
"A. I don't recall."
Did I read that correctly?
A. Yes, you read it correctly. And, in part, if I may, during the deposition --
Q. I simply asked you if you remembered -- if I read it correctly, that was my question, sir.
A. Yes.

Q. My next question is, on January 24th, one day after Mr. Deyo's letter and Mr. Kury's response drafted by you, you made a presentation at a Guidant board meeting, didn't you?
A. Yes.
Q. And you discussed with the board the letter that Mr. Deyo had sent on January 24th -- excuse me, 23rd, suggesting that Guidant had violated the merger agreement, didn't you?
A. Yes.
Q. Let's pull up Mulaney Exhibit 27, and this is the cover page of the presentation, and those are your initials in the upper right-hand corner, sir?
A. Yes, they are.
Q. Your handwriting?
A. Yes.
Q. So let's turn to Page 4 of the internal numbers, and could you read your handwriting? This is your handwriting, sir, highlighted?
A. Yes, it is.
Q. Could you read what you wrote, please?
A. Well, the first part of the highlight references the bullet point above, Boston Scientific reimbursed Guidant for payment within one business day, per the Boston Scientific agreement. Then there's a separate point being made, J&J letter suggesting no solicit violated.

(Continued on next page)

Q. You told the board that Mr. Deyo's letter was suggesting that he thought that -- withdrawn.

You were telling the board that J&J was suggesting that 4.02 had been breached, right?
A. Yes.
Q. Now, this was before the board made the determination to terminate the J&J merger agreement, wasn't it?
A. Yes.
Q. At that point, you could have advised the board that the issue Mr. Deyo had raised should be the subject of a formal legal analysis, right?
A. It was the subject of a formal legal analysis.
Q. It was the subject --
A. Yes.
Q. And that was presented to the board?
A. Yes, we advised the board that our conduct does not breach the merger agreement.
Q. Was that in writing?
A. No, it was not.
Q. Was any legal research done in connection with that opinion?
A. No. The analysis was part and parcel and consistent with the analysis I testified to about giving Mr. Kury in December of 2005.
Q. Did it occur to you that a board that was about to

determine whether to terminate a 20 plus billion dollar merger agreement with Johnson & Johnson, that to be safe rather than sorry, a legal opinion should be generated in writing for the board? Did that occur to you?
A. No, I didn't think it was necessary.
Q. You could have advised the board to hire someone to give an opinion, couldn't you?
A. Yes.
Q. But you didn't?
A. We didn't.
Q. In light of the fact that J&J had alerted Guidant to its concern that the merger agreement might have been breached, Guidant could have -- you could have advised the Guidant board to file a declaratory judgment action, right? Could have done that?
A. Could have done that.
Q. But you didn't?
A. We didn't.
Q. Now, I want to show you another agreement that has been examined during this trial, Kury Exhibit 22. This has been called the accession agreement. You could see in the first line of the first paragraph there is a statement that Abbott has been retained by Boston Scientific to advise it in connection with a potential transaction. Do you see that?
A. Yes.

Q. You have no recollection of advising Guidant on the subject of this wording in the accession agreement, do you?
A. I do not.
Q. Mr. Mulaney, you agreed, right, that if Boston Scientific and Abbott had been enjoined for proceeding with the offer, that Boston -- that Guidant's shareholders would have approved a deal at $63. You agree with that, right?
A. Well, at what point in time?
Q. At any point prior to the termination of the J&J agreement.
A. Well, by the time we terminated the J&J agreement, J&J was bidding $71 a share.
Q. Do you recall in your deposition giving testimony that if an injunction had been obtained that the shareholders of Guidant would have approved the offer from Johnson & Johnson at $63?
A. I think the testimony in my deposition was they could have. It was propounded to me that there was no way they would have, and I said they could have if they believed there was no way that Boston Scientific's offer was ever going to be forthcoming.
Q. Let's be clear on what you said then. Let's turn to your deposition, please, page 256. I will begin reading at line 3 and carry over to the next page. Do you recall being asked the following questions by Mr. Weinberger and giving the following answers:

"Q. Isn't it a fact that once Boston Scientific came in with a $71 offer that contained a binding agreement from Abbott which was accepted by the board as a superior proposal, there was no circumstances under which the shareholders were going to approve a $63 offer from Johnson & Johnson?"

There is an objection to form.

"A. I disagree with that statement."

Next question:

"Q. Why do you disagree with that?

"A. Because if Johnson & Johnson thought the merger agreement had been violated, they could go into court, get an injunction, prevent Boston Scientific and Abbott from proceeding with an offer in which -- which violates the merger agreement, which merger agreement was known to both of them and prevent Boston Scientific and Abbott from proceeding to attempt or interfere with the contractual rights of Johnson & Johnson.

"Q. And you think in that instance the shareholders would have approved a $63 offer, share offer from Johnson & Johnson?

"A. With Boston Scientific and Abbott enjoined from proceeding with respect to any offer for Guidant, yes."

Did I read that correctly?

A. Yes, it was possible.

Q. Well, you didn't say, "Yes, it's possible." Your answer was "Yes," right?

A. My testimony is it's possible. I wasn't making a

guaranteed prediction.
Q. Did I read that correctly when I read your answer as "yes"?
A. You read it correctly. I am giving my testimony.
THE COURT: Well, just answer the question.
Q. I want to call up Defendant's Exhibit 173, please.
THE COURT: Is it not in the binder or in the binder?
MR. COFFEY: DX-173 should be in there, your Honor. I'm not sure if we do it in alphabetical order. It's there. Third tab, your Honor.
THE COURT: You have it?
THE WITNESS: I do, your Honor.
Q. You make reference to this in your trial affidavit. The letter on its face says it was sent pursuant to Section 4.02(c) of the merger agreement. Do you see that?
A. Yes.
Q. You believed it was advisable to send this letter, right?
A. Yes.
Q. How did you come to learn of the call from Mr. Cornelius of Boston Scientific to the chairman of Guidant, Mr. Nicholas? How did you come to learn of that?
A. I think in a phone conversation with Mr. Kury or Mr. Kury and Mr. Cornelius together; I don't recall.
Q. Are you aware that a dinner had been arranged between the chairman of Boston Scientific and the chairman of Guidant?
A. Prior to Mr. Nicholas's phone call to Jim Cornelius?

Q. I hadn't gotten to the time yet. Did there come a time that a dinner had been arranged between those two gentlemen?

THE COURT: Ever?

MR. COFFEY: In or about November 2005.

A. I don't recall.

Q. So you don't recall whether that dinner had been arranged before or after your conversation with Mr. Kury?

A. I don't believe --

Q. And perhaps Mr. Nicholas?

A. Yeah, I don't believe I understood there was any dinner arranged. I think if I had heard that, I would have said, "What's the subject of the dinner?"

Q. Were you aware that Mr. Cornelius had accepted Mr. Nicholas's invitation to meet and discuss a possible business combination between Boston and Guidant?

A. I'm not aware.

Q. Now, are you aware that prior to Johnson & Johnson entering into the initial merger agreement in 2004, that Boston Scientific had expressed interest in acquiring Guidant?

A. Could you repeat the question? Before we entered into a merger agreement with Johnson & Johnson in December of '04, was I aware that Boston Scientific had expressed an interest in acquiring Guidant?

Q. Yes.

A. I was not aware of any such interest.

Q. Do you recall that in October 2005, Johnson & Johnson had indicated that it was considering its alternatives under the merger agreement, the initial merger agreement with Guidant in light of regulatory investigations and other issues?
A. Yes, at or about that time. Yes.
Q. And there were discussions, ultimately that -- withdrawn.
How did you become aware that Johnson & Johnson was having what I will call second thoughts?
A. I believe from a report of conversations between Bill Weldon, the CEO of Johnson & Johnson, and Jim Cornelius, the chairman and CEO of Guidant. Excuse me, Jim Cornelius was the chairman at that time. Ron Dormer still may have been the CEO of Guidant at that time of '05. I'm just not exactly clear.
Q. At the time that Guidant had become aware that Johnson & Johnson was having second thoughts, did you and Mr. Kury have any discussions about potential alternative acquirers should the Johnson & Johnson deal terminate?
A. I don't believe we did.
Q. Did you have any discussions with the bankers that were advising Guidant about other potential acquirers should the J&J merger terminate?
A. No, none that I can recall.
Q. I want to direct your attention to your trial affidavit, paragraph nine, please. This is the paragraph that pertains to the decision to send the letter to J&J apprizing them of the

contact from Mr. Nicholas.

The second sentence, let's highlight that, you advise Guidant that pursuant to the original merger agreement, it couldn't respond to that call from Mr. Nicholas in any other fashion other than to say it could not engage in a meeting or discussion. Is that right?

A. Couldn't respond in any fashion other than to say we could not engage in discussions, yes.

Q. Well, you just emphasized the word "any." Why did you do that?

A. Because you read it "in any other fashion," and I was taking the word "other" out and modifying "fashion."

Q. You were correcting me. I appreciate that. OK.

So no meeting is allowed, no discussion, right?

A. Correct.

Q. Next sentence you say that Guidant's ability to respond had terminated, right?

A. Yes.

Q. And then the next sentence is that Cornelius informed Nicholas that in light of the original merger agreement, he could not attend such a meeting, and that was the appropriate response in your view, right?

A. Yes, he could not attend such a meeting with that topic.

Q. And then the last sentence is that Guidant promptly notified Johnson & Johnson of this matter, right?

A. That's the next sentence.
Q. Right. That was consistent with 4.02(c), right?
A. Yes.
Q. The point that is in the second sentence that Guidant could not respond to that call from -- let me back up.
Would you agree with me that the call from Mr. Nicholas inquiring about Mr. Cornelius's ability for meeting to discuss a possible business combination between the two companies was an expression of interest from Mr. Nicholas?
A. Yes.
Q. Your advice here what you're saying in paragraph nine, the next sentence is: "Guidant could not respond to that expression of interest in any fashion other than to say it could not engage in a meeting or discussion." Right?
A. That's what it says.
Q. Now, that would also apply to Guidant's representatives under Section 4.02, right?
A. Well, the representatives couldn't solicit a proposal or participate in discussions with respect to one, yes.
Q. Right. So the prohibition on Guidant at this point was equally applicable to the representatives of Guidant, right?
A. Yes.
Q. Let's go back to the initial merger agreement Kury Exhibit 9, Section 4.02 at page 6226. I want to direct your attention to the sentence that follows the sentence that has (i) and

(ii). The next sentence reads: "Without limiting the foregoing, it is agreed that any violations of the restrictions set forth in the preceding sentence by any representative of the company or any of its subsidiaries shall be a breach of this Section 4.02(a) by the company." Do you see that?
A. Yes.
Q. That is why for the removal of any doubt, a representative couldn't do what the company couldn't do, right?
A. That is correct.
Q. Again, this isn't just boilerplate, right? The parties specifically negotiated over whether this sentence would be included in 4.02(a), right?
A. I don't recall the specific negotiations. If you so represent, I will accept your representation.
Q. Let's go to Kury Exhibit 5, which is the Skadden markup of the original merger agreement draft and page 4406, 07, and you see that Skadden in its markup has stricken that sentence, right?
A. Yes, I do.
Q. So what Skadden wanted to say was, hey, if the company does it, that's bad, but we don't want to be bound to any of our representatives triggering a breach. Isn't that what the purpose of trying to delete that was?
A. Basically, yes.
Q. At the end of the day, the deal Guidant struck with Johnson

& Johnson provided that this sentence or a substantially similar sentence, the one we just read in Kury Exhibit 9, was actually in the deal, right?
A. That is correct.
Q. So Johnson & Johnson bargained for the term that Guidant's representatives couldn't solicit or encourage or facilitate prior to there being a takeover proposal that more deemed to be likely to lead to a superior proposal, right?
A. Yes.
Q. Now, as the lead corporate partner in this deal, did you make it your business to ensure that each of Guidant's representatives were aware of this term?
A. Well, we certainly informed the investment bankers, yes.
Q. While we're in Kury Exhibit 5, 4406 -- sorry -- 4406, Skadden also -- the bottom of page 4406, Section 4.02(a), Skadden also sought to strike the words "or which could reasonably be expected to."
Do you see that?
A. Yes.
Q. Skadden wanted that out because it didn't want Guidant subject to a more subjective standard as opposed to something more objective, right?
A. Yes.
Q. This clause made the prohibition broader, right?
A. Arguably.

Q. Right. Because without it, 4.02(a) prohibits any action designed to facilitate a takeover proposal, but with this language, it's expanded also to capture any action which reasonably could be expected to facilitate a takeover proposal, right?
A. Yes.
Q. And Cravath on behalf of Johnson & Johnson rejected this change, right?
A. Yes.
Q. And the final agreement includes these words, right?
A. Yes.
Q. Johnson & Johnson had bargained for the broader prohibition, correct?
A. Yes.
Q. Now the first sentence of paragraph 9 of your affidavit says that the call from Mr. Cornelius was unsolicited. What is the basis for your statement that the call was unsolicited?
A. The report on what happened I got either from Mr. Kury or Mr. Kury and Mr. Cornelius.
Q. So that part of your sworn statement is basically what's reported to you by someone else?
A. Necessarily, yes.
Q. Now, were you aware of anything that had occurred in the days immediately preceding Mr. Cornelius's call that had encouraged Boston Scientific to reach out to Guidant to seek a

meeting to discuss a possible business combination between Boston Scientific and Guidant?
A. Not that I recall, no.
Q. Let's pull up Best Exhibit No. 1 and page 2369 and see if this helps refresh you recollection.
This is a letter that Boston Scientific sent to the NASD on January 13, 2006, and it includes a chronology of events related to the acquisition of Guidant that Boston Scientific felt were relevant.
Let's go to the second entry for October 27, 2005, which is four days before Mr. Cornelius -- excuse me -- Mr. Nicholas calls Mr. Cornelius.
THE COURT: What exhibit is this?
MR. COFFEY: It's Exhibit Best No. 1. It should be the very first thing in the book, right, Best No. 1. It's page 2369 are the last four digits, your Honor.
THE COURT: Yes.
Q. Were you aware that on October 27 -- back up. You know who Jeffrey Stude is?
A. His name is Jeffrey Stude. It's not a "Y." It's an "E."
Q. Pronounced Stude though?
A. Yes.
Q. You knew who he was in or about October of '05?
A. Yes.
Q. He was a member of the JP Morgan team that was advising

Guidant in connection with the J&J deal, right?
A. Yes.
Q. Were you aware that on or about October 27, Mr. Stude visited with Mr. Best, the CFO of Boston Scientific?
A. No.
Q. Were you aware of that until I just raised it with you and showed you this?
A. No.
Q. Does it concern you at all that Mr. Stude paid a visit to Boston Scientific at or about the time that J&J was expressing second thoughts to Guidant about the deal?
A. Not in and of itself, no. I assumed JP Morgan is constantly calling on Boston Scientific.
Q. You say in and of itself, is that -- assuming that they didn't talk at all about -- that he was there to talk about other deals, but not Guidant?
A. Yes.
Q. If at this meeting Mr. Best made an expression of interest along the lines of what Mr. Nicholas did a few days later, am I right that the appropriate response should have been "We can't have a discussion, our right to talk to anyone else has been terminated?" Isn't that what Mr. Stude should have said?
A. Well, what he shouldn't have done was, you know, solicit them to do so. How he phrased that to Mr. Best -- I mean, there are a number of ways to phrase it.

Q. Are you aware that Mr. Best has testified in this case that during that meeting he made JP Morgan aware that he had an interest in discussing further the possibility of acquiring Guidant?
A. No.
Q. Now that I've told you what the expression of interest was, do you agree that the appropriate response for a Guidant representative would have been to say, "Sorry, can't talk" or words to that effect?
A. Well, he couldn't pursue it with him.
Q. Well, what could he do? He could say, "No, we can't talk," right?
A. He could say any one of a number of things. He should not pursue them.
Q. He couldn't say, "Let me shoot you some deal terms." He couldn't say that, right?
A. He could not solicit.
Q. He couldn't say, "Let me arrange a meeting." Couldn't say that, right?
A. On the topic of -- with Guidant?
Q. Yes. In response to what I represented Mr. Best said.
A. No, he shouldn't.
Q. And he couldn't say, "You know, I'm going to take that back to my client"?
A. He could do that. He could say, "I'll tell my client what

you just told me."

Q. And that's not facilitating a communication from a potential bidder?

A. It's not facilitating a takeover proposal.

Q. Would that be reasonably expected to encourage Boston Scientific, the fact that a banker affiliated with Guidant said "I'll take your expression of interest back to my client"?

A. It could be conduct by an investment banker knowing it's not his job to answer on behalf of another client. Saying "I'll take it back to my client" may just be him saying "I'll take it back to my client."

THE COURT: But that would trigger then an obligation on the part of Guidant to communication, no meetings, no further discussions, correct?

THE WITNESS: Correct.

Q. You testified you were unaware of this, but the November 2 letter that was sent to J&J pursuant to 4.02(c) doesn't say anything about what occurred in Boston on October 27. Isn't that right?

A. That's correct.

Q. Now, four days later, Mr. Nicholas picks up the phone and call the chairman of Guidant. Do you believe knowing now that Mr. Stude paid a visit to Boston that that call was a coincidence?

A. Well, it was consistent with an interest expressed by

Mr. Best that Boston Scientific had with respect to Guidant.
Q. So whatever Mr. Stude did, he didn't certainly -- it didn't dissuade Boston Scientific from reaching out four days later, right?
A. Didn't prevent it.
Q. Now, the cancellation of this meeting between Cornelius and Nicholas notwithstanding, Guidant --
A. Sorry, I testified Mr. Cornelius turned down the meeting. I didn't know that it was canceled.
Q. Fair enough, sir.
Now, Guidant knew after that call from Mr. Nicholas, knew and expected that Boston Scientific was gearing up to make a rival offer for Guidant, right?
A. Wrong. That's conjecture.
Q. It would have been a surprise to Guidant if Boston Scientific made an offer?
A. It certainly wasn't expected.
Q. So let's take a look at Kury Exhibit 10. We've taken a look at the letter. Now I want to take a look at the email that was sent on behalf of Mr. Cornelius. You see it's forwarding to the board Boston Scientific's proposal. And you see he characterizes it as the "surprise" Boston Scientific letter and proposed transaction, right?
A. Yes. He puts "surprise" in quotes, yes.
Q. That's because it wasn't a surprise, right?

A. No, I don't understand that to be the case.
THE COURT: What is your understanding, if you have one, why surprise is in quotes?
THE WITNESS: Because I think it was a genuine surprise.
Q. And it was necessary to put it in quotes to emphasize that it was a genuine surprise?
A. I'm not in a good position to speculate why Mr. Cornelius put it in quotes.
THE COURT: But you just did a minute ago, didn't you?
THE WITNESS: Yes.
THE COURT: So you have no idea why it's in quotes?
THE WITNESS: I do not, your Honor.
THE COURT: All right.
Q. Mr. Mulaney, I want to thank you for your patience for coming around the bend, I guess. I should thank the Court and everyone else.
Before you and I had a little back-and-forth about lawsuit versus closing, so I want to talk about this idea that J&J could have sued or should have sued.
In your trial affidavit, it's at paragraph 30 if you want to look, you testified that because J&J did not take or to your knowledge even threaten legal action to prevent Guidant from entertaining or accepting Boston's offer, that that supports your view that J&J must have believed that Guidant was

acting properly. Is that fair?
A. Yes.
Q. You would have expected that if J&J truly believed there had been a breach, they would have brought a lawsuit, right?
A. I would have expected they would have likely brought a lawsuit. I would have expected I would have heard from Cravath that Johnson & Johnson was asserting there had been a breach. Never heard from Cravath throughout the entire time any allegation, assertion, suggestion or otherwise that our conduct constituted a breach of the merger agreement. And I would have anticipated that we would have had a notice of breach consistent with the notice provisions of the merger agreement on January 9 or shortly thereafter.
Q. Would you mind reading back my question, and, Mr. Mulaney if you wouldn't mind answering the question I posed?
THE COURT: "You would have expected that if J&J truly believed there would have been a breach, they would have brought a lawsuit?" I'm reading what's on here. Do you want to rephrase?
Q. The precise point is you would have expected them, if you truly believed there was a breach, among other things, what you would have expected them to do was to file a lawsuit, right? Isn't that the point you're making?
A. Yes, among other things.
Q. Now, you were aware, I think you make the point that J&J

increased its bid twice. At the time that J&J did that, you were aware that Johnson & Johnson and Guidant had been working on integrated companies for over a year, right?
A. Yes, about a year.
Q. There was a lot of water under the bridge, right, in terms of dealing with the FTC, right?
A. Yes.
Q. Drawing up the license agreement with Abbott, right?
A. A lot of things that happened in the course of that year, yes.
Q. Actually, I want to jump to a different topic for a moment. Several times you and I were debating Johnson & Johnson was having information provided to third party investor candidates. I was making the point it was after the merger agreement. You were making the point that that didn't matter. Do you have any personal knowledge of the basis on which these third parties were getting information from Guidant?
A. These -- I'm sorry, your question?
Q. You alluded several times to what you said was a fact that Johnson & Johnson was interpreting the confidentiality agreement in such a way that Guidant was providing information to potential divestiture partners after the merger agreement with J&J had been signed?
A. No, I was saying it was my understanding that Johnson & Johnson had provided Guidant information to third parties.

Q. Do you have any personal knowledge of that fact, sir?
A. I recall being so advised by Ian John. I don't have a personal knowledge of it.
Q. So the answer is, no, you have no personal knowledge to support that statement, right?
A. That's correct. My testimony was that was my understanding.
Q. You have no personal knowledge whether JP Morgan on behalf of Guidant had entered into separate contracts with all of those third parties whereby Guidant was providing information to them, right? You have no knowledge about those agreements, right?
A. Are you saying whereby Guidant was providing information?
Q. Right.
A. Or Johnson & Johnson was providing information?
Q. The question is: You are unaware of what other agreements there might have been between an agent of Guidant on Guidant's behalf and those various potential divestiture candidates, right?
A. In connection with whose offer?
Q. In connection with J&J trying to solve J&J's antitrust risk?
A. I don't know that I'm aware of all the agreements, if you are referring to some set of agreements.
Q. I want to get back to this lawsuit idea. So you made the

point in your affidavit that J&J increased its bid twice instead of filing a lawsuit. So let's discuss what Johnson & Johnson knew and didn't know as of January 11, which is the day it increased its bid, and see if you agree with me.

It knew that the CFO of Boston, not Guidant, had stated to analysts on January 9 that Abbott had gotten a deeper dive into Guidant information, right? It knew that fact, right?

A. That's what they said they knew, yes.

Q. Now, at least according to Mr. Deyo and Mr. Hilton, their view is they called Mr. Kury to alert him to their concerns about this, and he said he would get back to them, right? That's another fact that according to them -- I know Mr. Kury disputes it, but that's another fact that J&J would have been looking at as it's evaluating whether to bring a lawsuit, right?

A. I guess that's fair.

Q. They would also know that Mr. Kury didn't push back and say "I've been advised by Skadden that Abbott is a representative" or "Skadden has advised me that I could do it." He didn't say any of those things. He said, "I'll get back to you." They knew that fact, right, according to Mr. Deyo and Mr. Hilton, right?

A. Well, they knew what they testified to.

Q. And that Mr. Deyo's letter of January 23 was written.

Again, this is from J&J's perspective because they're the one evaluating whether to sue, and that's the letter that was sent because Mr. Kury didn't get back to them in the interim, right?
A. Well --
Q. Johnson & Johnson knew that fact, right?
A. According to their version of the facts, yes.
Q. And what we're doing is we're trying to build a complaint here, and I'm trying to figure out what facts would go into this complaint that you would have expected would have been filed.
Now J&J knew about section -- well, as of January 11, there was an oral defense agreement among Boston Scientific and Guidant and Abbott, correct?
A. Yes.
Q. And Johnson & Johnson didn't know about that, right?
A. I don't believe -- I don't know, but I don't believe they did.
Q. As of January 11, Guidant had been providing confidential information voluntarily to the Federal Trade Commission to aid regulatory approval for Boston Scientific. Isn't that right?
A. I'm not sure of that. It's possible.
Q. Well, if it's possible, it's another fact that Johnson & Johnson didn't know as of January 11, right?
A. I can't affirm what Johnson & Johnson knew or didn't know as of that time.

Q. Now, you've talked a bit about this idea that Abbott might be a joint bidder, but as of January 11, Johnson & Johnson had never been advised that Abbott was a joint bidder with Boston Scientific in the -- correct?
A. Correct, but that wasn't the legal rationale for why we did what we did.
Q. Prior to January 11, Guidant had signed an addendum in which it contractually agreed to keep the existence and identity of a divestiture candidate such as Abbott secret from Johnson & Johnson. That's a fact, right?
A. No. The addendum agreement didn't say a divestiture candidate. It said a potential divestiture candidate.
Q. Point taken. But that was also a fact that Johnson & Johnson did not know about, that addendum, the language in that addendum. Johnson & Johnson did not know about that as of January 11, right?
A. The answer is I don't know.
Q. And then there was an accession agreement that described Abbott as having been retained to advise Boston Scientific. Johnson & Johnson didn't know about that on January 11, right?
A. I don't know.
Q. JP Morgan, a banker working on the Guidant transaction and a representative of Guidant had gone to Boston to meet with the CFO of Boston, met with that CFO, and according to the CFO, agreed to take word of Boston's interest back to Guidant.

That's another fact that Johnson & Johnson was not aware of as of January 11, correct?
A. I don't know.
Q. Larry Best of Boston Scientific has testified that his board would not have permitted Boston Scientific to make a firm offer for Guidant unless Boston had a signed-on-the-dotted-line divestiture buyer lined up in advance. Are you aware of that?
A. No, I'm not. I'm aware you've indicated he so testified.
Q. And that's a fact that Johnson & Johnson didn't know on January 11, right?
A. I don't know.
Q. That fact would have been important in deciding whether to sue, right; that Boston wouldn't have gone forward without Abbott, and Abbott wouldn't go forward without diligence?
A. I don't know if it necessarily would have been that important if you otherwise thought you had a case to enjoin a Boston Scientific proposal.
Q. So let's say for argument's sake despite what Johnson & Johnson knew and what it didn't know, that it had concluded to go forward with a lawsuit to enjoin the BSC deal, even on the facts just as it knew it on January 11. Now, if Johnson & Johnson were to stand on its $63 offer, bring that lawsuit and lose, in your experience, it's basically game over for Johnson & Johnson, right? They're going to lose the deal?
A. If Boston Scientific's offer is as firm and good as it

eventually was on January -- later in January, they would have lost, yes.
Q. But you already testified that if Johnson & Johnson had successfully enjoined the transaction, they would have been able to get the company at $63, right?
A. I said it's possible that stockholders would approve a $63 offer if they thought that was the only offer around.
Q. Well, that's what you say today, but in your deposition you said the answer to that question was yes, right?
A. I said yes, the stockholders could approve it. I didn't guarantee they would do so.
Q. In your experience when the offer to shareholders is a stand-alone company or a deal that was a premium over market which had by contract been recommended for approval by the board, those are typically approved by the shareholders, right?
A. Depends on the alternatives, but typically, yes.
Q. Now I am going to use an expression that my partner --
A. Also, you said recommended by the board. The Guidant board, there was this hypothetical vote about an enjoined Boston deal and Guidant -- I'm sorry, and a J&J offer of $63, the Guidant board would have the fiduciary duty and the responsibility and the permission under the merger agreement to decide under the facts and circumstances of that situation whether to recommend the stockholders vote for the J&J deal or not.

Q. Well, they were contractually required to make-- that recommendation had to be given, right?
A. Not if their fiduciary duties would cause them to think otherwise.
Q. Now, had J&J been successful and acquired the company at $63 a share, there was a pretty high likelihood that there would be shareholder lawsuits, right?
A. Well, there were shareholder lawsuits in any eventuality. So the odds of shareholder lawsuits in a public company M and A are close to a hundred percent.
Q. In fact, there had been a derivative action filed in Indiana in connection with the Johnson & Johnson amended deal, right? Withdrawn.
So the investors could claim that Guidant's breach, which would have been found by the enjoining court, had cost investors a $72 a share deal, right? They could claim that? That would be their claim, right?
A. The plaintiffs can claim a lot of things.
Q. Well, if there was a $72 deal on the table and a court enjoined it because it found that Guidant had breached the deal, a well-reasoned complaint, not a frivolous complaint, would be: Hey, we could have gotten the deal at $72 but for the breach, so we're suing over the difference between $72 and $63, right?
A. Could someone make an allegation like that and bring a

lawsuit? Yes.
Q. Is there any doubt in your experience that that would be precisely the claim that would be brought; that the Guidant board breached its fiduciary duties by not overseeing management which breached the agreement and cost the shareholders a $72 deal. Isn't that what the lawsuit would claim?
A. Well, we're speculating. It could have, but there's a big difference between what lawsuits claim and the merits of a lawsuit.
Q. Now, in the post Johnson & Johnson-victory world, Johnson & Johnson now owns Guidant, right?
A. If that's what you mean by in the post Johnson & Johnson-victory world.
Q. Right, Johnson & Johnson has successfully enjoined it; the shareholders approved it; and they own it. So, in addition to the cost for lawyers and disruption to management, it's Johnson & Johnson that would be on the hook for any damages awarded in that investor lawsuit, right?
A. Well, if they own Guidant, according to your hypothetical, depending on what happens in that lawsuit and the merits of it, they're responsible for that lawsuit.
Q. So to go back to your view that a lawsuit would have been filed, it should have been filed if they believed it. When you made that point in your affidavit, did you think through the

fact that down the road Johnson & Johnson would be on the hook for potentially billions of dollars of damages to investors? Was that part of your analysis?
A. Did I assume that there was a meritorious claim that would entitle plaintiffs' lawyers to billions and billions of dollars in damages if they sued and got an injunction? I don't believe that's a meritorious claim.
Q. But whatever the outcome of that lawsuit -- frivolous, meritorious or otherwise -- it would have been Johnson & Johnson that would have had to deal with the ramifications of that lawsuit, right?
A. That's true.
THE COURT: Well, there might have been lawsuits just after December 5, given what was a publicly announced intention to file a higher tender offer, right?
THE WITNESS: Lawsuits come for sorts of reasons --
THE COURT: You have no way of knowing, right?
THE WITNESS: No way of knowing.
Q. What we do know is it would be Johnson & Johnson that would be on the hook?
THE COURT: Either way, right?
THE WITNESS: Yes.
MR. COFFEY: Thank you, your Honor. I have no further questions.
THE COURT: Let's take a break. So are we going to

finish this witness today?

MR. BOIES: I don't think so, your Honor.

THE COURT: I guess we're not going to finish the next one either. I guess, think about what that means for the schedule going forward given what we've planned for this week. Thursday is a day I plan to be sitting, so are we going to be going into Thursday?

MR. OHLMEYER: I think we'll probably finish by then.

MR. WEINBERGER: I'm not so sure. I think the cross for Mr. Kury is going to be fairly substantial.

THE COURT: Unlike this one.

MR. WEINBERGER: It will be less. I think it's possible, but I wouldn't bet on it.

THE COURT: You guys can chat over it. Let's use ten minutes to have a bathroom break.

Mr. Boies, you're going to do the redirect?

MR. BOIES: I am, your Honor.

(Recess)

THE COURT: Okay. Mr. Boies, you may proceed.

MR. BOIES: Thank you, your Honor.

REDIRECT EXAMINATION

BY MR. BOIES:

Q. Mr. Mulaney, I want to begin with a small point you were just talking to counsel about, and I proceed with a certain amount of trepidation since you, the Court and counsel all seem to be in agreement, but I want to press on that issue that I don't quite understand.

You're all saying that if there was a shareholder lawsuit for breaches of fiduciary duty, that Johnson & Johnson would be on the hook if it acquired Guidant. I want to understand why you think that would be so, since the lawsuit for a breach of fiduciary duty would presumably be a derivative loss, correct?

A. Yes, if it was a derivative loss for breach of fiduciary duty, the directors would be on the hook and more particularly in plaintiff's litigation the D and O carrier would be on the hook. It might not have been at the expense of Johnson & Johnson.

Q. Indeed, in a derivative lawsuit, ordinarily the recovery would go to the corporation; is that correct?

A. Yes.

Q. Let me turn to something more substantive.

THE COURT: But just so I'm clear, I mean, the questions, at least as I understood them, you tell me if you understood them, was not derivative lawsuits necessarily but also shareholder lawsuits, right?

THE WITNESS: I understood the questioning along the lines that if it's a shareholder class action, but if the allegation, as the topic is pursued, is a breach of fiduciary duty on how you conducted yourself, that is a derivative lawsuit, not a class action lawsuit. And any recovery goes from those who breached their breach of fiduciary duty to the corporation, and the corporation is not out of money. It only has more money.

THE COURT: But where would the money be coming from, as far as you understand?

THE WITNESS: Real world? It comes from the D and O carrier, the director, officers and liability carrier.

THE COURT: Do you know whether there was any such coverage for the D and O?

THE WITNESS: Yes, the directors of Guidant had D and O coverage. I don't know the amounts.

THE COURT: Okay. All right.

BY MR. BOIES:

Q. And to the extent that the D and O coverage was not sufficient, who would be on the hook for that?

A. The directors themselves.

Q. And is it fair to say there are two kinds of shareholder

lawsuits; there are shareholder lawsuits for breach of fiduciary duty in the derivative lawsuits, and shareholder lawsuits for breaches of the Securities Act, which are technically class actions?
A. That's correct.
Q. And the class actions go against the company; is that correct?
A. That's correct.
Q. And the derivative lawsuits for breach of fiduciary duty go against the officers and directors?
A. Correct.
Q. Now, let me, as I say, turn to something more substantive. At any time when you were representing Guidant, did you have any doubt as to whether Guidant was acting consistently with its obligations under the merger and other agreements for Johnson & Johnson?
A. No.
Q. At any time were you aware of anyone else at Skadden that ever expressed any doubt or dubiety about whether Guidant was in any way breaching its duties to Johnson & Johnson?
A. No.
Q. At any time, were you aware of anyone at Guidant, Mr. Kury or anyone else at Guidant, who expressed any doubt or dubiety about whether Guidant was in any way breaching its duties to Johnson & Johnson?

A. No.
Q. What was your role, as you understood it in connection with representing Guidant, in connection with the Johnson & Johnson and Boston Scientific acquisition discussions?
A. We were a corporate counsel for the company. The company's led by its board of directors. We would give advice and make presentations to the board of directors and assist them in their decision-making process and on a day-to-day basis, the management of the company, which operates the company. We would interact with them in terms of negotiating the agreements complying with those agreements, et cetera.
Q. Was it your understanding that Guidant, its management, its inside counsel, its board were looking to you and Skadden to provide it with legal advice?
A. That was my understanding, yes.
Q. And what was your approach to providing that legal advice in terms of how seriously you took that obligation?
A. Well, we took it very seriously, obviously, in the context of a public acquisition because of the financial consequences of it, the public nature of it, and as I said, the near certainty of shareholder litigation with respect to it.
And then as when Boston Scientific made a takeover proposal in December, it became clear that the transaction was going to get a lot more publicity than it already had attracted, that there were two bidders for Guidant, and one

bidder was going to end the process very disappointed and potentially a tough examiner of everything that went on in the interim.
Q. If you had had any doubt about whether or not Guidant was fulfilling all its obligations to Johnson & Johnson, would you have brought that to the attention of the Guidant board and the Guidant general counsel?
A. Yes, I would have.
Q. And was it your understanding that the Guidant board and the Guidant general counsel was counting on you to do that, if you had any doubt at all about the propriety of what they were doing?
A. That was my understanding of their expectation of Skadden Arps, yes.
Q. And we all know Skadden and its reputation, and your own position and reputation. For the record, is it important to you and to your law firm that you be sure that advice along these lines that you give clients in these circumstances is not only right but it's cautious and conservative advice?
A. Yes.
Q. And why is that?
A. Because it's a substantial economic matter. It affects the lives of a lot of people working at the company, and our clients should be represented to the absolute best of our ability at all times.

Q. Let me ask you to look at some of the documents that counsel asked you to look at, and I'd like to begin with Kury Exhibit 2, which is the confidentiality agreement between Guidant and Johnson & Johnson, dated August 4, 2004.
THE COURT: This is in the binder that Mr. Coffey was using?
MR. BOIES: That's in the binder counsel was using.
Q. Now, you testified that paragraph one described what information was involved and to whom certain information could be given; do you recall that?
A. Yes.
Q. And then you said that Paragraph 2 began a discussion of how that information had to be treated; do you recall that?
A. Yes, I do.
Q. And I think you referred to certain paragraphs of this as the confidentiality provisions of the confidentiality agreement; do you recall that?
A. Yes, I do.
Q. Focusing on what you defined as the confidentiality provisions of this confidentiality agreement, is there any limitation here on what use Johnson & Johnson can make of Guidant's information, other than what is contained in the second paragraph of this agreement?
A. I think the second paragraph outlines what use they can make of it, and other paragraphs make other provisions with

respect to third-party subpoenas and the possible return of the information if the matter is dropped or the provider asks for such information, et cetera.
Q. Is there any limitation in this agreement on Johnson & Johnson giving information, giving Guidant's information to potential divestiture partners?
A. So long as they comply with what we have been calling the confidentiality provisions, there isn't a limitation. If it's done for the purposes indicated, exploring a possible negotiated transaction, et cetera.
Q. And I want to go through those items, the et cetera part of it, because I want to be very explicit about what the limitations are on Johnson & Johnson in terms of its use of Guidant's confidential information. One is it must be used solely for the purpose of exploring a possible negotiated business arrangement, correct?
A. Correct.
Q. And, second, it may not be used for any other business or competitive purpose, correct?
A. Correct.
Q. And, third, the information must be kept confidential, correct?
A. Correct.
Q. Now, if those three provisions are met, what is your understanding of whether or not Johnson & Johnson was free to

give Guidant confidential information to a potential divestiture partner, as an example?
A. They could do so.
Q. And is that consistent, as you understood it, with what the purposes of the no-solicitation provisions of the merger agreement were?
A. Well, I think they are two different things.
Q. Can you explain that?
A. The no-solicitation provisions were directed not to what Johnson & Johnson could do with Guidant information, but they were directed to what Guidant could or could not do. One, in terms of not soliciting a takeover proposal and, two, in terms of responding to a takeover proposal, if one was made.
Q. Let me follow up with that because I've been asking you to look at what Johnson & Johnson could do with Guidant's information pursuant to the confidentiality agreement that's Kury Exhibit No. 2.
Let me also ask you now to look at Kury Exhibit No. 9, which is, I hope, the merger agreement, which is also in the book that counsel has given you. Do you have that?
A. I do.
Q. Now, there are limits in this agreement that you testified about as to the circumstances under which Guidant can give Guidant confidential information to people, correct?
A. Correct.

Q. Are there limitations in this agreement, the merger agreement we're talking about now, on what Johnson & Johnson can do with Guidant's confidential agreement in terms of giving it to third parties?
A. Yes. Section 5.02 of this agreement says that any Guidant information in the hands of Johnson & Johnson has to be dealt with pursuant to the terms of the Johnson & Johnson confidentiality agreement.
Q. That is, it directs you back to Kury Exhibit No. 2, correct?
A. Correct.
Q. So let me ask the question this way. Is there any limit in the merger agreement, that is Kury Exhibit No. 9, on how Johnson & Johnson uses Guidant confidential information, other than what is in the August 4, 2004, confidentiality agreement that is Kury Exhibit No. 2?
A. No. I think the restrictions are in the confidentiality agreement.

THE COURT: Did you ever convey that to anybody at Guidant?

THE WITNESS: That the restrictions -- Yes, it was understood the information given by Guidant to Johnson & Johnson was subject to the terms of the Johnson & Johnson confidentiality agreement.

THE COURT: No, I mean, did you ever convey, either in response to the January 23rd letter or any other time prior to January 23rd, that the limitations on Guidant and Boston Scientific, for that matter, were no greater or less than what Johnson & Johnson was subject to in this section 5.02?

THE WITNESS: I don't recall if we had a discussion in terms of that parallelism, but that certainly was the case and was so understood, your Honor.

THE COURT: Understood by whom?

THE WITNESS: By me.

THE COURT: By you. But you didn't include that in the draft letter response to the January 23rd letter?

THE WITNESS: That is true, your Honor. That response, I said, partook of a lot of rhetoric and was not an attempt to be a comprehensive response of the reasons why Guidant was permitted to do what it did.

THE COURT: But when Mr. Kury said, but let's be serious, folks, what is the basis for our analysis, or words to that effect, did you explain all this, what you just said now, to him then?

THE WITNESS: What I explained to him was that Guidant was permitted to give information to Abbott because Abbott was properly considered a representative of Boston Scientific under the merger agreement.

THE COURT: All right. So that's falling back to the merger agreement?

THE WITNESS: Yes.

THE COURT: And the definition of representative?

THE WITNESS: Yes.

THE COURT: But that's a little different than what you told me this morning, right?

THE WITNESS: What I told and recall discussing with Bernard Kury, on the one hand, and what is legally permitted, on the other hand, are two different items that I was attempting to describe adequately.

THE COURT: The only thing you told Kury was that Abbott's a representative under the merger agreement; is that correct?

THE WITNESS: Yes, that was the focus and the prime rationale for why we did what we did.

THE COURT: All right.

THE WITNESS: And why we're permitted to do what we did.

THE COURT: Sorry. Next question.

BY MR. BOIES:

Q. Let me just follow up with respect to the, "let's be serious," e-mail and your proposal, and let me try to begin with the e-mail draft that you sent, which I know counsel showed you.

MR. COFFEY: Mulaney 25.

Q. Mulaney 25.

A. I have it.
Q. And this is an e-mail that was sent showing your suggested response to Mr. Deyo's letter; is that correct?
A. That is correct.
Q. And when you were preparing this response, what were you trying to do?
A. I guess to deal with some of the allegations made by Mr. Deyo in the letter along the lines of that we had somehow violated the first part of 4.02(A) in that we had somehow solicited and facilitated a takeover proposal in violation of the agreement, one.

Two, to indicate that it seemed selective of Mr. Deyo to complain about giving information to Abbott, which was providing financing for the transaction, on the one hand, and to have no complaint or objection to giving due diligence information to Boston Scientific -- I'm sorry, to Bank of America or Merrill Lynch, who were also providing financing, on the other hand.

But most importantly and overall, to say the timing of this message for the first time, with the total absence of any prior notice under the merger agreement or any communication from Kravath that there was some concern that we were violating the merger agreement, is incredible, and we found the Deyo letter to be quite a strange and bizarre communication.
Q. Now, you mentioned in that last answer that there had not

been any communication from Kravath about this, and you mentioned that in your testimony on cross-examination as well. Why was that significant to you?
A. Between January 9th, when it was publicly known that Abbott was the divestiture purchaser and would be buying businesses from Guidant in excess of $4 billion and would be making a loan to Boston Scientific to help them facilitate their takeover proposal, we had two negotiating sessions or proposals from Johnson & Johnson to raise the Johnson & Johnson price for Guidant from 64, roughly, to 68 and then from 68 to 71, both of which increases were memorialized in an amendment to the merger agreement between Guidant and Johnson & Johnson.
And that if Bernie Kury thought someone was making allegations about possible breaches of a merger agreement, those possible breaches would have been addressed in the process of amending the merger agreement on January 11th or January 13th. And, indeed, I believe that the Court's opinion on the estoppel argument from Guidant made that precise point.
Q. Was your relationship and dealings with Mr. Townsend at Kravath such that you would or would not have expected Mr. Townsend to raise with you an allegation of breach if he felt there had been one?
A. I would have expected him to raise an allegation of breach if he thought there had been one, or if he had any serious concern that there might have been one.

Q. Did he ever do so?
A. He did not.
Q. Did anyone from Kravath ever raise with you or, to your knowledge, with Guidant any suggestion or allegation that there had been any breach?
A. No.
Q. Now, with respect to Mr. Deyo's letter, you said that you interpreted that letter as indicating that they felt that they had or that there had been a breach of the agreement; do you recall that?
A. Yes.
Q. Does the term "breach" appear in that letter?
A. I don't believe it does. I think the question is, how could you have given information consistent with the merger agreement.
Q. Did Johnson & Johnson ever provide you or, to your knowledge, Guidant, with any notice of a breach of the agreement?
A. No.
Q. If they had believed there actually been a breach of the agreement, would you have believed that they would have provided you such notice?
A. Yes.
Q. Why?
A. Because I think they would have jealously protected their

rights under the merger agreement with Guidant, and if they wanted to acquire Guidant and thought their proposal was being interfered with, in breach of their agreement, they would assert their rights and take advantage of the provisions of the merger agreement that specifically permit specific performance and requests for injunctive action.

Q. And does the merger agreement specifically deal with the subject of notice?

A. Yes, it does, and there's a formal specific manner in which notices under the merger agreement are to be made. And in the course of the months, there were various communications consistent with those notice provisions that Guidant sent to J&J.

Q. Did that last sentence mean that there came a time, or perhaps times, in which Guidant gave Johnson & Johnson notice of a breach pursuant to the notice provisions of the merger agreement?

A. Yes. In November of 2005, Guidant formally notified Johnson & Johnson that their assertion that they did not have to close the merger agreement because of an alleged material adverse change at Guidant would be a breach of the agreement, and that was followed up by or accompanied by a lawsuit brought by Guidant against Johnson & Johnson.

Q. Let me ask you to turn to section 4.02 of the merger agreement, which is I think Kury Exhibit 9.

A. Yes, I have it.
Q. And I want to begin by focusing on 4.02(B), which you testified on cross-examination about in the context of the joint defense agreement; do you recall that generally?
A. Yes.
Q. And there was a suggestion from counsel that, to some extent, somehow the joint defense agreement might have been covered by the language of 4.02(B); do you recall that, in general?
A. Yes, I do.
Q. I'd like to go through the actual language of 4.02(B) with you. And at the bottom of the page, it talks about not adopting, recommending, publicly proposing to adopt or recommend or allow the company or any of its subsidiaries to execute, enter into, and then there is a list of items, letter of intent, memorandum of understanding, agreement in principle, merger agreement, acquisition agreement, option agreement, joint venture agreement, partnership agreement.
I want to stop there for a second. How would you characterize those kind of agreements, if you could?
A. I characterize them as transactional agreements.
Q. Transactional agreements. And for the record, what do you mean by transactional agreement?
A. An agreement between a buyer and a seller.
Q. And was a joint defense agreement a transactional

agreement?
A. No.
Q. Now, after the list of agreements that I just read, 4.02(B) goes on to say, "or other similar contracts;" do you see that?
A. Yes.
Q. Is a joint defense agreement something that is, in your judgment, a similar contract to the transactional agreements that have been specifically identified?
A. No, it is not.
Q. Let me ask you to look next at section 4.02(C) and counsel took you through some of the drafting history of this section.
A. Yes.
Q. And if you need to, the draft, if you want to sort of with your pen or your hand on Page 6228, Kury Exhibit 09, and then look back at Kury Exhibit 5, which is the draft that you were referred to.
A. Yes.
Q. And at the bottom of 4408 of Kury Exhibit 5, you see 4.02(C); do you see that?
A. Yes, I do.
Q. And am I correct that originally Johnson & Johnson had proposed that the company -- that Guidant keep Johnson & Johnson fully informed in all respects of the status and details of takeover proposals, and then, first, Guidant made some proposed changes to that and then Johnson & Johnson came

back with additional changes and a compromise was reached; is that correct?

A. That's correct.

Q. And the compromise was to leave in the fully informed language, but to add in the Guidant proposal of, "in all material respects;" is that correct?

A. That is correct.

Q. And why, if at all, did Guidant believe it was useful to qualify this provision by adding in "in all material respects"?

A. Because the intended obligation was to undertake to keep Johnson & Johnson informed of material changes or material aspects of a takeover proposal but not necessarily every change or development.

Q. And did you believe in 2005 and 2006, that Guidant was keeping Johnson & Johnson fully informed in all material respects of takeover proposals and any changes to those proposals?

A. Yes, I did. And, further, in accordance with the rules of this agreement, before Guidant could take any action or terminate this agreement, we had to give formal notice to Johnson & Johnson that we intended to do so, and they then had five business days to decide if they wanted to respond in any fashion to our intended termination.

So keeping Johnson & Johnson informed in all material respects is with reference to a set of procedures which give

Johnson & Johnson notice that we're intending to terminate the agreement, the five business days to make their business judgment as to what they want to do about it. And until Johnson & Johnson gets that notice, they're not informed or they're not in danger, if you will, of Guidant terminating the agreement.

Q. And there did come a time when Guidant gave that notice, correct?

A. That's correct.

Q. And at that time, what, if anything, did Johnson & Johnson do in those five business days?

A. They did nothing in, I believe, four of those five business days. On the fifth business day, we got a letter from Mr. Deyo that we've discussed, on January 23rd.

Q. And that was all they did; is that correct?

A. That was all we heard from Johnson & Johnson. There was one other thing we heard from Johnson & Johnson. On the 24th, after our board meeting, we hadn't heard anything from Johnson & Johnson. Mr. Cornelius, the Chairman of Guidant, called Mr. Weldon, the Chairman of Johnson & Johnson, and said, are you going to do anything? And Mr. Weldon said no. So Guidant then knew that, at midnight, they could terminate the Johnson & Johnson merger agreement and enter into the Boston Scientific merger agreement.

MR. BOIES: Your Honor, I'm going to turn to another subject.

THE COURT: Okay. That's fine.

MR. BOIES: How long, just for planning purposes --

THE COURT: I think we'll go to about 5:30 or reasonably around 5:30. If we need to go a little longer to finish a subject, that's fine.

MR. BOIES: Thank you.

THE COURT: Okay.

BY MR. BOIES:

Q. Let me turn now to that board meeting. Counsel showed you a presentation with some handwritten notes; do you recall that?

A. Yes.

Q. And you informed the board, according to your testimony on cross-examination, that there had been an allegation that Guidant had not fulfilled its obligations under the merger agreement and confidentiality agreement; is that right?

A. I told them that was a suggestion from Johnson & Johnson to that effect, yes.

Q. And what did you tell the board your view was of that suggestion?

A. Well, one, that it was without merit and, two, that the timing of it, following a total absence of any communication to that effect from Kravath since January 9th, and following the formal notice under the merger agreement from January 9th until January 23rd, seemed very strange and hard to explain conduct

on behalf of Johnson & Johnson. Put another way, it seemed to undercut the credibility of the concerns expressed in the letter.
Q. And you were asked whether in connection with that, you had undertaken any formal legal research or prepared a formal written opinion; do you recall that?
A. Yes.
Q. Did you feel that it was necessary to do so in order to give the Guidant board the advice that you gave them?
A. No, I did not.
Q. Why not?
A. Because it's a matter of contract interpretation and relevant to which is the intent of the parties. And I had negotiated the agreement, and I believed I understood its intent and provisions and I had Guidant, in accordance with that set of provisions, to act in compliance with them.
Q. If you had had any doubt about whether or not Guidant had complied with all of its obligations to Johnson & Johnson, would you have told the Guidant board of those doubts?
A. Yes, I would have.
Q. Did you express any doubt at all to the Guidant board as to your conclusion that Guidant had not violated any of the obligations of Johnson & Johnson?
A. I did not.
Q. How seriously did you take your role as advisor, legal

advisor to the Guidant board?
A. Very seriously.
Q. And did you understand that the Guidant board and the Guidant general counsel were depending on you for your legal advice in this area?
A. Yes, I did.
Q. Let me now ask you to turn to section 4.02(A), and at one point in your cross-examination you had talked about the definition of representatives in the first part of 4.02(A) as being a definition that was intentionally brought. Do you recall that?
A. Yes.
Q. Why was it in Johnson & Johnson's interest to have the definition of representatives be a very broad definition?
A. Because Johnson & Johnson, like a purchaser in a public company acquisition, does not want the company, i.e. Guidant, or anyone working with Guidant, to solicit a superior proposal or solicit a takeover proposal.
And so Johnson & Johnson's intent in writing the first sentence of 4.02(A) clearly was to write a comprehensive prohibition covering Guidant, and anyone working with Guidant, so that none of those parties would be permitted to engage in a solicitation.
It was so understood, and that's why I say the definition of representatives was a very broad definition. It,

obviously, isn't a textbook definition because the lower case word representative is one of the litany of items indicated within the overall definition of a, capital R, representative.
Q. With respect to the obligation not to solicit or facilitate the solicitation of a rival bid, that was something that bound Guidant and Guidant's representatives but no one else, correct?
A. Correct.
Q. So anyone who was not within the definition of representative would be able to go out and try to stimulate a rival bid; is that correct?
A. That is correct.
Q. And as a result, what was Guidant or what was Johnson & Johnson's incentive in terms of how broad to make the term representatives?
A. We understood them to -- and we understood the term representatives as defined to be very broad and to mean, in effect, anyone working with Guidant is a representative and may not solicit a superior proposal.
Q. Now, when you get to --
THE COURT: Why didn't you write it that way, then?
THE WITNESS: Well --
THE COURT: Anyone working with Guidant?
THE WITNESS: Yes.
THE COURT: Why didn't you just include that in the litany?

THE WITNESS: We could have. We didn't. I understood representative, lower case R, to pick up that broad concept.

THE COURT: So actual representation is not involved in your definition of representative?

THE WITNESS: Correct. It's a use of the term representative that is not meant to convey an ambassador or someone necessarily representing someone. It's a person working with, in this case, Guidant and any such persons may not be retained by Guidant to solicit or enter into discussions.

THE COURT: And that's the common usage of the term, representative, in mergers and acquisitions?

THE WITNESS: It is in this specific context, your Honor. So put another way, did I think that was a narrow set of some small group of professionals and other professionals or people that Guidant might work with were out from under the definition of representatives and could, therefore, be retained by Guidant to go out and solicit proposals? The answer is, I did not.

THE COURT: Well, why did you need to list bankers, financial advisors, attorneys and accountants? Why did you need to list any of those if representative is such a broad term?

THE WITNESS: It is further explication of the types of people that might be working with Guidant and --

THE COURT: Further explication? You just said a minute ago that this included anybody else who was working with them.

THE WITNESS: Representative, as I understood it to be, broad enough.

THE COURT: So people who provide sandwiches, people who provide messenger service, people who provide pens and pencils?

THE WITNESS: We did not understand, your Honor, that there was some cute way to get around the no-solicitation provision by calling -- by deeming someone not to be an investment banker, financial advisor, attorney, accountant or other adviser, and engaging that person, retaining that person and say, please, go out and solicit a higher proposal.

And to be very specific, we did not think that we could call up Abbott and say, we just signed a merger agreement with Johnson & Johnson, but, you know, Abbott, you're not a representative under the definition of 4.02(A), so would you please go out and stir up a better proposal for us?

THE COURT: Well, I guess that's my question. So representative would seem to be a vague term that will, as you define it, that would define virtually nothing. You weren't concerned about that?

THE WITNESS: No, because I understood the legitimate intent of the purchaser in this situation, Johnson & Johnson, to say, Guidant, you and anyone working with you, cannot solicit proposals. That's the deal. You have to be facile, and you may not evade this restriction by calling someone a commercial banker or an industry player or a private equity player or someone else and say, you know, you're not a representative under this narrow definition, so I'm going to retain you and charge you with finding a better proposal for Guidant.

We did not so understand Johnson & Johnson to, if you will, create a very weak piece of Swiss cheese for a non-solicitation provision. We understood it intended to be broad, not capable of facile or, you know, disingenuous end running.

THE COURT: I mean, broad is a two-way street, right?

THE WITNESS: Yes, and the other way of the street is when it's next used with respect to whom Guidant can give information. But in this part of the street, the first time it's used in this agreement is facilitating Johnson & Johnson getting what Johnson & Johnson wanted, which is, Guidant, neither you nor any person working with you can go out and solicit proposals.

THE COURT: I assume you guys get paid a lot of money to do these sort of things, it never occurred to you to write "or anyone working with you," if that's what you meant?

THE WITNESS: Well, no, your Honor. This is language that Johnson & Johnson wants to worry about. If Johnson & Johnson were under-inclusive, that would only be to our advantage, but we did not interpret the intent of the parties or our agreement to suggest that this definition of representatives was meant to be narrow or constricted to some subset of professionals, which would then create an easy way to evade the basic no-solicitation provision.

THE COURT: Okay. Go ahead.

BY MR. BOIES:

Q. Let me approach it this way, because you've mentioned Bank of America a couple of times. Bank of America, as you said, is a commercial bank, correct?

A. At that time it was, yes.

Q. Neither was not an investment banker, advisor, attorney, accountant or an agent of Guidant, correct?

A. Correct.

Q. Did you believe that Johnson & Johnson had an interest in making sure that Bank of America did not decide, on its own, without any help from Guidant, but just on its own, to go out and start soliciting additional bids so that Bank of America could maybe finance a larger transaction?

A. Well, there's no connection with Guidant. Then Bank of America and other investment banks, not retained or working with Guidant, could do what they generally do when a public deal is announced, they talk to their other clients and say, Guidant is being sold for $76 to J&J, do you want to bid more?

THE COURT: But an investment banker is listed here, right?

THE WITNESS: An investment banker that has been, after definition, retained by it, meaning the company. So Merrill Lynch, which had not been retained by Guidant, could go out to its customer list and say, did you see the public news? Guidant is being sold to Johnson & Johnson for $76 a share. Guidant is in play. Do you want to bid?

And when a public deal is announced, the parties not involved or retained by the seller or the buyer, frequently do go out and try to stir up an alternative transaction. That's how they make a living.

THE COURT: Okay. Go ahead.

BY MR. BOIES:

Q. And for a commercial bank, once a commercial bank started working with Guidant on this deal, as it stopped just being unrelated but now it started working with Guidant on this deal, was it your understanding that that commercial bank became a representative under section 4.02(A)?

A. Yes.

Q. And was it your understanding that that was something that was important to Johnson & Johnson?

A. Yes. My understanding was Johnson & Johnson wanted to write, and thought they were writing, a no-solicitation

provision that worked and was not easily evaded.
Q. Now, turning to the second part of 401, when it talks about to whom Guidant can furnish information, it is somebody who is making a takeover proposal and the takeover proposal are maker's representatives, correct?
A. Correct.
Q. And representatives is capitalized, correct?
A. Yes.
Q. And what does that indicate?
A. It's referring to the definition specified in the earlier part of 4.02(A) in connection with what Guidant and its representatives could not do in terms of solicitation, the broad definition of representatives that we just talked about.
Q. In the drafting or preparation of this agreement, did Johnson & Johnson or anyone ever suggest that the term representatives, the capitalized term representatives in the second part of 4.02(A), ought to have a narrower interpretation than the term representatives in the first part of 4.02?
A. Not in drafting and agreeing -- not in drafting the agreement, no.
Q. It would, theoretically, have been possible to have a very broad definition of the term representatives for the no-solicitation first part of 4.02(A) and then a different definition for the second part in terms of furnishing information by Guidant, right?

A. That's correct.
Q. Was that ever proposed by Johnson & Johnson or anyone else?
A. No.
THE COURT: Just so I'm clear, you told me this morning that you don't, now, at least you don't think, that the merger agreement provided any restriction whatsoever. That's not the basis for allowing Abbott to review these materials, right?
THE WITNESS: I'm sorry, your Honor. I'm not sure I understood your question.
THE COURT: I thought this morning you were suggesting to me that neither the J&J confi nor the merger agreement were relevant to the issue of whether or not Abbott could be shown these materials.
THE WITNESS: I hope not, your Honor.
THE COURT: No.
THE WITNESS: I think both are very relevant.
MR. BOIES: Could I?
THE COURT: Go ahead.
MR. BOIES: Because I think I know exactly what the Court is focusing on because I was confused by this point during the cross-examination as well.
BY MR. BOIES:
Q. Am I correct that you make a distinction between what Guidant can give and what can be given to a person making a

takeover proposal, or their representatives, in terms of what information, under what circumstances?
A. If I understand your question, yes.
Q. And can you explain that? Because I don't think that came out clearly in the cross-examination.
A. Guidant is permitted, by the merger agreement, to give information to the person making the takeover proposal and its representatives, subject to the other provisions.
Once it has provided that information to a person such as Boston Scientific, Boston Scientific, not because of the merger agreement but because of how the confidentiality agreement works, is able to share that information with other parties, so long as it protects the confidentiality of the information, and the information isn't used for business or competitive purposes and is used with respect to helping Boston Scientific formulate a takeover policy.
Q. So to take this in the context of the actual facts of this case relating to Abbott, in order for Guidant to give Guidant confidential information to Abbott, Abbott would have to fit into one of the categories of either somebody who is making a takeover proposal or was a representative of someone making a takeover proposal; is that correct?
A. That is correct.
Q. But if Boston Scientific, who had already been qualified, so to speak, as somebody making a takeover proposal, wanted to

give that information to Abbott, Abbott would not have had to fit into that representative category; is that correct?
A. That is correct.
Q. Abbott would still have to treat the information confidentially and only use it for purposes of a merger or acquisition agreement without using it for competitive purposes; is that correct?
A. That is correct.
Q. And that's true regardless of whether they get it from Guidant or whether they get it from Boston Scientific or some other maker of a takeover proposal?
A. Correct.
Q. Let me turn to -- there was a discussion during your cross-examination of the fact that Johnson & Johnson couldn't discuss with prospective takeover partners or prospective acquisition partners prior to the definitive agreement, but Boston Scientific, according to your understanding, could. And there was a suggestion that there was some inconsistency there; do you recall that generally?
A. Yes, I do.
Q. Why, in your view, was it appropriate to treat Boston Scientific different from Johnson & Johnson in this respect?
A. Because with respect to -- because the circumstances were different with respect to Guidant and what the world understood Guidant's status to be. So when Johnson & Johnson and Guidant

are talking, those discussions are confidential and the confidentiality of those discussions could be compromised if Johnson & Johnson said to us, oh, by the way, let me talk to Abbott. I want to see if they can buy this business to facilitate antitrust clearance. Guidant would not have been prepared to risk a leak of our discussions with Johnson & Johnson at that point.

Separate --

THE COURT: Presumably, Johnson & Johnson wouldn't want that leak either because that would prompt a bidding war, or at least potentially, over Guidant, right?

THE WITNESS: It could, yes.

THE COURT: So presumably the parties' interest are aligned on that point?

THE WITNESS: Yes, your Honor.

THE COURT: But with respect to whether Johnson & Johnson ought to be entitled to the same protection going forward, they would have presumably had an interesting in not being a stalking horse for other potential acquirers, right?

THE WITNESS: Well, they'd like to avoid it, but by the nature of a public company acquisition, and as we bargained for, once they signed an agreement with us, they became the stalking horse bid, and if anyone wanted to bid more --

THE COURT: So the whole point of the no-solicitation clause is there are limits on what Guidant can do to protect

J&J from being a stalking horse; that's something they didn't want, right?

THE WITNESS: They did not want to be a stalking horse, your Honor. Whether you want it or not, when you sign and announce a public deal and you're the buyer, you're the talk stalking horse. You just made a base bid. If somebody wants to bid more for Guidant, Guidant doesn't have to stir it up. There's an advertisement in the Wall Street Journal.

THE COURT: I understand that, but, look, the point is, though, is that things like a termination fee and things like, if it had been negotiated clearly, which maybe it was, maybe it wasn't, but things like an agreement that says, you can't share these things with potential divestiture partners in the event of antitrust considerations, that might make it harder for a competing bid to emerge, right?

THE WITNESS: Yes.

THE COURT: And then those are things that probably, presumably, an acquirer like Johnson & Johnson would want?

THE WITNESS: They may want it, but it was totally unacceptable to Guidant, and we wouldn't have entered into an agreement with any such reflection.

THE COURT: So did you negotiate it? Did you discuss this?

THE WITNESS: We discussed we wanted, in consideration for dealing exclusively with Johnson & Johnson, a passive market check, to use that phrase, or put another way, freedom to deal with any takeover proposal that is unsolicited by us that comes in, and to give information to and to negotiate with that party in the same way we gave information to and spoke to you, Johnson & Johnson, and see if they can come up with a better bid.

THE COURT: But if it had been a joint bidder situation, you would seen that you would have had to have given notice to Johnson & Johnson about Abbott, right?

THE WITNESS: Yes, your Honor.

THE COURT: But by allowing Boston Scientific to characterize them as someone working with us on the deal, i.e. a representative, that would about solve any notice requirement?

THE WITNESS: Yes, your Honor, but --

THE COURT: That was -- you think that was negotiated, that was part of the deal that you negotiated?

THE WITNESS: Well, that was part of the deal, but the purpose --

THE COURT: But was it ever expressly discussed?

THE WITNESS: I don't know that it was expressly discussed, but the purpose of the notice provisions are to keep Johnson & Johnson reasonably informed about material developments as to a proposal, as to which, at some point in time, they may get formal notice from us that we are now prepared to terminate the Johnson & Johnson agreement and take the other offer. And then Johnson & Johnson has five business days to decide what it wants to do.

THE COURT: No, no, I get all that. I guess the issue I'm trying to understand is, clearly, the parties could have included divestiture partners or potential divestiture partners in the list of people who would be allowed to review these materials, right?

THE WITNESS: Yes, they could have, your Honor.

THE COURT: But they didn't?

THE WITNESS: Not in those terms, no.

THE COURT: So you're telling me that at the time the merger agreement was negotiated and executed, you had a firm understanding that divestiture partners or potential divestiture partners were included in that list?

THE WITNESS: Yes, your Honor.

THE COURT: And have you shared that with anybody? Did you share that with anybody at the time?

THE WITNESS: We didn't --

THE COURT: You certainly expected antitrust issues, right?

THE WITNESS: Yes, your Honor.

THE COURT: So was there any discussion about where divestiture partners or potential divestiture partners fit in that definition, outside or inside?

THE WITNESS: At the time the agreement was being negotiated, I don't recall express discussions on that specific topic.

THE COURT: If you had a view, you kept close to your heart that was sincere.

THE WITNESS: That is true. It's also the fact, as I said, your Honor, if there was anything that was foreseeable in terms of who an intervenor might be, it would be a party in the industry that would have had antitrust problems.

THE COURT: All right. Is this a good spot, or do you want to get a word in to shut me down?

MR. BOIES: That's a good spot, your Honor.

THE COURT: Let's pick up again tomorrow morning at 9:30. Timing-wise, what are we looking at?

MR. BOIES: Your Honor, I probably have about 30 minutes, 25 to 40 minutes.

THE COURT: Okay. All right.

MR. COFFEY: Very small.

THE COURT: Short. And then we'll start with Mr. Kury, and you think he'll go the rest of the day?

MR. WEINBERGER: It's possible, but I think if they have someone else ready, it might be a good idea. I just don't know.

THE COURT: And then after Mr. Kury, it's going to be, what we've got listed, is Mr. John and Mr. Strain, in that order?

MR. OHLEMEYER: Yes, your Honor. Do you want to hear from Mr. Spiegel on the issue of Mr. Stoll, or do you want to save that for the morning?

THE COURT: Well, I hate to have somebody waiting around. Are they waiting around for any other reason?

MR. OHLEMEYER: No, he'll be here tomorrow.

THE COURT: Are you sure?

MR. SPIEGEL: Yes, your Honor.

THE COURT: Okay. I hate to keep you waiting.

MR. BOIES: Your Honor, the only thing I would suggest, and the Court may, for its own purposes, may want to hear it is, I think we're prepared to stipulate to the admissibility of the deposition. That is, neither one of us is going to make a hearsay objection. We're both prepared to stipulate.

THE COURT: If that's the case, I don't think I need to make a ruling on 804 grounds, right?

MR. WEINBERGER: That's right.

THE COURT: You're going to withdraw your declaration?

MR. BOIES: We're going to withdraw the declaration. We're both going to stipulate to the admissibility of --

THE COURT: He's not a party.

MR. BOIES: He's not a party. We have to stipulate or the Court would have to make a ruling, but we're prepared to make a stipulation, I don't think the Court has to make a ruling.

THE COURT: I think that's probably right. Do you agree?

MR. WEINBERGER: I agree, and we have a little bit of it we want to play. We'll have it ready this time tomorrow. If not, we'll do it later in the week.

THE COURT: Mr. Spiegel, you're off the hook then.

MR. SPIEGEL: Thank you, your Honor.

THE COURT: Go to OTB. Play hooky tomorrow. Thanks, everyone. Have a nice night.

(Adjourned to December 16, 2014, at 9:30 a.m.)

INDEX OF EXAMINATION

Examination of: Page

CHARLES MULANEY

Direct Mr. Boies 704

Cross By Mr. Coffey 705

Redirect By Mr. Boies 908